



INNER WEST COUNCIL

DEVELOPMENT ASSESSMENT REPORT

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|---|---|
| Application No. | D/2018/58 |
| Address | 109 Birchgrove Road, BIRCHGROVE NSW 2041 |
| Proposal | Part demolition, ground floor and first floor alterations and additions to existing dwelling, subdivision, construct a new two storey dwelling on the newly created lot, and associated works, including new fencing, landscaping and tree removal. |
| Date of Lodgement | 2 February 2018 |
| Applicant | Raymond Panetta Architects |
| Owner | SS415 Holdings Pty Ltd |
| Number of Submissions | 4 – (six pieces of correspondence received from 4 properties) |
| Value of works | \$900,000 |
| Reason for determination at Planning Panel | Clause 4.6 variation exceeds officer delegation |
| Main Issues | <ul style="list-style-type: none"> Streetscape/heritage Trees / Stormwater |
| Recommendation | Approval |



LOCALITY MAP

| | | | | |
|---------------|--|------------|--|-----|
| Subject Site | | Objectors | | ↑ N |
| Notified Area | | Supporters | | |

Note: Due to scale of map, not all objectors could be shown.

1. Executive Summary

This report is an assessment of the application submitted to Council for part demolition, ground floor and first floor alterations and additions to existing dwelling, subdivision, construct a new two storey dwelling on the newly created lot, and associated works, including new fencing, landscaping and tree removal at 109 Birchgrove Road, Birchgrove. The application was notified to surrounding properties and four submissions were received.

The main issues that have arisen from the application include:

- Whether the required replacement plantings have sufficient room to grow
- Whether the proposed subdivision is consistent with the subdivision pattern in the locality.

Conditions have been imposed to ensure the replacement plantings have sufficient room to grow. The non-compliance regarding minimum lot size is acceptable given the lots are compatible with the streetscape and do not result in significant adverse impacts for surrounding dwellings; therefore the application is recommended for approval.

2. Proposal

The proposal includes:

- Demolition including the existing rear addition, rear wall of main dwelling, shed and internal fireplaces;
- Removal of three trees (Bangalow Palm, Avocado and Murraya) located in the rear yard;
- Strata subdivision of site into two lots, with one dwelling on each lot;
- Alterations and additions to existing dwelling on Lot 1 at ground and first floor level.
- Construction of a new two storey dwelling on Lot 2 with modern dormer in the front elevation and new 1.2 m high timber front fence.

3. Site Description

The subject site is located on the southern side of Birchgrove Road, between Spring Street and Macquarie Terrace. The site consists of one allotment and is generally rectangular with a total area of 196 sqm and is legally described as Lot 1 DP 66496.

The site has a frontage to Birchgrove Road of 10.06 metres. The site supports a two storey dwelling of a single storey form with the first floor being an attic level contained within the roof form containing a dormer window. The adjoining properties support a two storey modern brick dwelling at 26 Thomas Street, Birchgrove which is located to the west of the subject site and a single storey rendered heritage dwelling to the east of the site at 111 Birchgrove Road, Birchgrove.

The property is located within a heritage conservation area. The following trees are located on the site and within the vicinity.

- *Archontophoenix cunninghamiana* (Bangalow Palm) located at the rear of the site.
- *Persea americana* (Avocado) located at the rear of the site
- *Murraya paniculata* (Murraya) located at the rear of the site.

4. Background

4(a) Site history

The following section outlines the relevant development history of the subject site and any relevant applications on surrounding properties.

Subject Site

| Application | Proposal | Decision & Date |
|----------------|---|---|
| T/2008/59 | Removal of one Ficus tree. | Approved subject to replacement planting 11 March 2008. |
| PREDA/2017/222 | Alterations and additions to existing house, construction of new house plus strata subdivision. | Advice issued 16 October 2017. Summary of advice below: |

The preDA advice concluded that amended plans / additional information were required addressing the following issues:

- An increased front setback so that the front façade of the proposed infill building is to be located approximately one (1) metre behind the front façade of the retained original building on the site;
- The creation of a front garden space within the front setback area. A low wooden front picket fence should be retained across the front property boundary;
- The front portion of the building is to be devoid of a podium so that it has direct access to the front garden and the overall scale of the building is lowered as viewed from Birchgrove Road;
- The front facade of the infill building should have vertically proportioned windows of timber construction;
- A simple (timber posted) single storey front verandah could supported;
- The wall materials could comprise a face brick or rendered masonry in a light recessive tone;
- The roof form as it presents to Birchgrove Road should be a pitched/ hipped/gabled roof form with support being given to a front and or side dormers to achieve satisfactory amenity if the upper level rooms are provided within the roof space; and
- It is envisaged that the dwelling will take a split level form with the rear level being at a higher level than the front portion of the building.
- The design must include replacement planting to the front and the rear of the site. The trees shall be capable of attaining a minimum mature height of 6m. In this regard, the proposed in-fill dwelling must setback a minimum 3.5 metres to the front boundary to facilitate the required tree at the front of the proposed site.
- The design must demonstrate the proposal complies with relevant controls in relation to solar access, visual privacy and view loss. The adjoining properties must be accurately depicted on the drawings and if compliance is not achieved, the design should be amended to achieve compliance.

The advice did not object to subdivision of the property, merely advised that any future

development application must be accompanied by a Clause 4.6 exception that satisfactorily justifies the breach in the development standard regarding minimum lot size.

Surrounding properties

32 Thomas Street.

| Applications | Proposal | Decision |
|--|---|----------|
| DA/1998/268 M/1999/203 BA/98/552 | Alterations and additions to existing freestanding dwelling. Alteration to roof form. | Approved |

4(b) Application history

The following table outlines the relevant history of the subject application.

| Date | Discussion / Letter/ Additional Information |
|---------------|--|
| 13 April 2018 | <p>Letter sent to application outlining Council concern with plans, namely:</p> <ul style="list-style-type: none"> - Streetscape appearance / colours / bulk and scale - Landscaping / replacement trees - Solar access - Location of rainwater tank - Levels of rear decks - Views <p>The letter also requested that submission of a Clause 4.6 exception to Clause 4.3A(3)(b) of Leichhardt Local Environmental Plan 2013 with regard to site coverage.</p> |
| 27 April 2018 | <p>Additional information / amended plans addressing Council's letter submitted. These changes in the amended plans include:</p> <ul style="list-style-type: none"> - reducing the height of the new dwelling, - modifying its roof form and dormer window, and - relocating the rainwater tank of the existing dwelling to the rear yard, - lowering height of front verandah of new dwelling so that it does not constitute site coverage. <p>Photomontages of view impact from 32 Thomas Street were submitted.</p> |

5. Assessment

The following is a summary of the assessment of the application in accordance with Section 4.15 of the Environmental Planning and Assessment Act 1979.

5(a) Environmental Planning Instruments

The application has been assessed against the relevant Environmental Planning Instruments listed below:

- State Environmental Planning Policy No 55—Remediation of Land
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
- State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017
- Leichhardt Local Environmental Plan 2013

The following provides further discussion of the relevant issues:

5(a)(i) State Environmental Planning Policy No 55—Remediation of Land

State Environmental Planning Policy No. 55 - Remediation of Land (SEPP 55) provides planning guidelines for remediation of contaminated land. LDCP 2013 provides controls and guidelines for remediation works. SEPP 55 requires that remediation works must be carried out in accordance with a Remediation Action Plan (RAP) as approved by the consent authority and any guidelines enforced under the Contaminated Land Management Act 1997.

The site has not been used in the past for activities which could have potentially contaminated the site. It is considered that the site will not require remediation in accordance with SEPP 55.

5(a)(ii) State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

BASIX Certificates were submitted with the application and will be referenced in any consent granted.

5(a)(iii) Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

An assessment has been made of the matters set out in Clause 20 of the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005. It is considered that the carrying out of the proposed development is generally consistent with the objectives of the Plan and would not have an adverse effect on environmental heritage, the visual environment, the natural environment and open space and recreation facilities.

5(a)(iv) State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017

The proposal involves the removal of two prescribed trees. No objection is posed to the removal of the *Murraia* however given that the bangalow does not conflict with the proposed plans, it is recommended that it be retained.

It is noted that the policy aims to increase canopy coverage across the Greater Sydney Area and that three trees were removed from the property last year without consent. This matter is currently under investigation and cannot be addressed under this application,

Nevertheless, the preDA advice required replacement planting of trees capable of attaining a minimum mature height of 6m to the front and the rear of the site. The advice also stated that a minimum set back of 3.5 metres is required to facilitate these trees.

Whilst the submitted *Landscape Plan* dated 20/11/2017, drawn by A Elboz of *Space Landscape Designs* and tree species selection is generally acceptable, the proposed building design does not allow sufficient landscape area to allow for the proposed trees' establishment. A condition of development consent is recommended to require the private open space of dwelling one adjacent to the living area to be increased as well as the retention of the Bangalow Palm. As such, it is recommended that an amended landscape plan be prepared and a suitable condition is included requiring this.

It is noted that the amended *Stormwater Drainage Plan* dated 2 May 2018, prepared by *Development Engineering Solutions* proposes underground rainwater tanks within the front landscape area of *House No 2*. This is not supported as it further reduces the available landscaped area and would prevent the establishment of a significant tree in this setback. A condition of development consent will require this tank to be relocated to under the rear deck.

5(a)(v)Leichhardt Local Environment Plan 2013 (LLEP 2013)

The application was assessed against the following relevant clauses of the Leichhardt Local Environmental Plan 2013:

- Clause 1.2 – Aims of the Plan
- Clause 2.3 – Zone objectives and Land Use Table
- Clause 2.6 – Subdivision Requirements
- Clause 2.7 – Demolition Requires Development Consent
- Clause 4.1 – Minimum subdivision Lot size
- Clause 4.3A(3)(a) – Landscaped Area for residential development in Zone R1
- Clause 4.3A(3)(b) – Site Coverage for residential development in Zone R1
- Clause 4.4 – Floor Space Ratio
- Clause 4.5 – Calculation of floor space ratio and site area
- Clause 4.6 – Exceptions to development standards
- Clause 5.10 – Heritage Conservation
- Clause 6.1 – Acid Sulphate Soils
- Clause 6.2 – Earthworks
- Clause 6.4 – Stormwater management

The following table provides an assessment of the application against the development standards:

| Standard (maximum) | Proposal | % of non-compliance | Compliance |
|--|---------------------------------|---------------------|------------|
| Floor Space Ratio Maximum 0.9:1 | 0.8:1 | Complies | Yes |
| Landscape Area Minimum 15% | 18.5% | Complies | Yes |
| Site Coverage Maximum 60% | 60% | Complies | Yes |
| Lot size: Minimum 200 sqm | Lot 1: 95 sqm Lot 2: 105 sqm | 52.5% 47.5% | No No |

The following provides further discussion of the relevant issues:

Clause 4.6 Exceptions to Development Standards

As outlined in table above, the proposal results in a breach of the following development standards:

- Clause 4.1 – Minimum subdivision Lot size

Note: The subject application was lodged on 2 February 2018 and does not benefit from the amendments to the Leichhardt Local Environmental Plan through the provision of Standard Instrument (Local Environmental Plans) Amendment (Minimum Subdivision Lot Size) Order 2018 which came into effect on 20 April 2018.

Clause 4.6(2) specifies that Development consent may be granted for development even though the development would contravene a development standard.

1. *The objectives of this clause are as follows:*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
2. *Development consent may be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument.*

The application requests that development consent be granted for the development even though the proposal will contravene the minimum permissible lot size development standard prescribed under Part 4 of Leichhardt Local Environmental Plan 2013.

The applicant has advised that *Clause 4.1 of the Leichhardt Local Environmental Plan 2013 states that the minimum subdivision lot size for the site is 200m². The subject site has a total area of 196m². The proposed subdivision is a strata subdivision of the proposed attached dual occupancy into two (2) allotments. Following the proposed strata title subdivision, the proposed lots will provide for an area of 92m² (Lot 1) and 104m² (Lot 2). Given a minimum lot size of 200m², proposed Lot 1 will fall short of the standard by 108m² and Lot 2 will fall short of the standard by 96m².*

3. *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

A written request has been submitted by the applicant raising the following key issues seeking to justify the contravention of the standards:

- The proposal meets the objectives of the clause;
 - The proposed lot sizes are not inconsistent *with the subdivision pattern exhibited along Birchgrove Road.*
 - *It should be noted that, although the proposed allotment sizes fall below the development standard, each proposed lot is capable of accommodating a dwelling, the site provides for appropriate areas of landscaping and private open space which generally align with Council's LEP and DCP. Overall, the variation does not have a detrimental impact on the capacity of the lots to comply with Council's controls.*
 - It is only through a recent court case, *DM & Longbow Pty Ltd v Willoughby City Council* [2017J NSWLEC 1358, that has necessitated the requirement of a Clause 4.6 Variation for minimum lot size where strata or community title subdivision is proposed. This has only arisen as an anomaly due to the way the Clause is written, as prior to this decision of the court Clause 4.1(4) was interpreted to mean that no minimum lot size was prescribed to strata or community title subdivision, only Torrens title. In dialogue with the Department of Planning and Environment since the court ruling, it was noted that an amendment to Clause 4.1(4) which would clarify the wording was discussed and exhibited in 2015 but had been put on hold pending further discussion.
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) the consent authority is satisfied that:*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) the concurrence of the Secretary has been obtained.*

Comment: The applicant has addressed the matters required under Clause 4.6 Exceptions to development standards, and it is considered to be well founded in this instance. The proposal will not result in a detrimental impact on the public interest and can satisfy the

objectives of the development standard/s and General Residential zoning as demonstrated below:

- The proposal is compatible with the desired future character of the area in relation to building bulk, form and scale
- The proposal complies with the Floor Space Ratio, Landscaped Area and Site Coverage standards, providing a suitable balance between landscaped areas and the built form
- The siting of the building is within the building location zones where it can be reasonably assumed development can occur.

The contravention of the development standard does not raise any matter of significance for State and Regional Environmental Planning and there is no public benefit in maintaining strict compliance with the standard.

(5) *In deciding whether to grant concurrence, the Secretary must consider:*

(a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

The granting of concurrence to the proposed variation of the development standard will not raise any issues of state or regional planning significance.

(b) *the public benefit of maintaining the development standard, and*

The proposed variation to the development standard will not compromise the long term strategic outcomes of the planning controls to the extent that a negative public benefit will result. In this regard, there is no material public benefit to the enforcing of the development standards.

(c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

No other matters are required to be considered before granting concurrence.

Comment: It is noted that a number of submissions have raised non-compliance with the subdivision development standard as a concern stating that approval will set an undesirable precedent and result in the creation of *two very small blocks in what is already a very densely-covered area*.

While such lot sizes would be of concern elsewhere in the municipality, in this instance, the lot size is commensurate with surrounding lots and does not result in significance adverse impact, hence the Clause 4.6 submission is supported.

5(b) Draft Environmental Planning Instruments

5(a)(vi) State Environmental Planning Policy (Environment)

The NSW government has been working towards developing a new State Environmental Planning Policy (SEPP) for the protection and management of our natural environment. The Explanation of Intended Effect (EIE) for the Environment SEPP was on exhibition from 31 October 2017 until the 31 January 2018. The EIE outlines changes to occur, implementation details, and the intended outcome. It considers the existing SEPPs proposed to be repealed and explains why certain provisions will be transferred directly to the new SEPP, amended and transferred, or repealed due to overlaps with other areas of the NSW planning system.

This consolidated SEPP proposes to simplify the planning rules for a number of water catchments, waterways, urban bushland and Willandra Lakes World Heritage Property. Changes proposed include consolidating the seven existing SEPPs including Sydney

Regional Environmental Plan (Sydney Harbour Catchment) 2005. The proposed development would be consistent with the intended requirements within the Draft Environment SEPP.

5(c) Development Control Plans

The application has been assessed and the following provides a summary of the relevant provisions of Leichhardt Development Control Plan 2013.

| Part | Compliance |
|---|----------------|
| Part A: Introductions | |
| Section 3 – Notification of Applications | Yes |
| Part B: Connections | |
| B1.1 Connections – Objectives | Yes |
| B2.1 Planning for Active Living | Not applicable |
| B3.1 Social Impact Assessment | Not applicable |
| B3.2 Events and Activities in the Public Domain (Special Events) | Not applicable |
| Part C | |
| C1.0 General Provisions | Yes |
| C1.1 Site and Context Analysis | Yes |
| C1.2 Demolition | Yes |
| C1.3 Alterations and additions | Yes |
| C1.4 Heritage Conservation Areas and Heritage Items | Yes |
| C1.5 Corner Sites | Not applicable |
| C1.6 Subdivision | Yes |
| C1.7 Site Facilities | Yes |
| C1.8 Contamination | Not applicable |
| C1.9 Safety by Design | Yes |
| C1.10 Equity of Access and Mobility | Not applicable |
| C1.11 Parking | Not applicable |
| C1.12 Landscaping | No |
| C1.13 Open Space Design Within the Public Domain | Not applicable |
| C1.14 Tree Management | Yes |
| C1.15 Signs and Outdoor Advertising | Not applicable |
| C1.16 Structures in or over the Public Domain: Balconies, Verandahs and Awnings | Not applicable |
| C1.17 Minor Architectural Details | Not applicable |
| C1.18 Laneways | Not applicable |
| C1.19 Rock Faces, Rocky Outcrops, Cliff Faces, Steep Slopes and Rock Walls | Yes |
| C1.20 Foreshore Land | Not applicable |
| C1.21 Green Roofs and Green Living Walls | Not applicable |
| Part C: Place – Section 2 Urban Character | |
| Suburb Profile | |
| C2.2.2.6 Birchgrove distinctive neighbourhood, Birchgrove | Yes |
| Part C: Place – Section 3 – Residential Provisions | |
| C3.1 Residential General Provisions | Yes |
| C3.2 Site Layout and Building Design | No |
| C3.3 Elevation and Materials | Yes |
| C3.4 Dormer Windows | Yes |
| C3.5 Front Gardens and Dwelling Entries | Yes |

| | |
|---|---------------------------------|
| C3.6 Fences | Yes |
| C3.7 Environmental Performance | Not applicable – BASIX affected |
| C3.8 Private Open Space | Yes |
| C3.9 Solar Access | No |
| C3.10 Views | Yes |
| C3.11 Visual Privacy | Yes |
| C3.12 Acoustic Privacy | Yes |
| C3.13 Conversion of Existing Non-Residential Buildings | Not applicable |
| C3.14 Adaptable Housing | Not applicable |
| Part C: Place – Section 4 – Non-Residential Provisions | Not applicable |
| Part D: Energy | |
| Section 1 – Energy Management | Not applicable |
| Section 2 – Resource Recovery and Waste Management | Yes |
| Part E: Water | |
| Section 1 – Sustainable Water and Risk Management | |
| E1.1 Approvals Process and Reports Required With Development Applications | |
| E1.1.1 Water Management Statement | Yes |
| E1.1.2 Integrated Water Cycle Plan | Not applicable |
| E1.1.3 Stormwater Drainage Concept Plan | Yes |
| E1.1.4 Flood Risk Management Report | Not applicable |
| E1.1.5 Foreshore Risk Management Report | Not applicable |
| E1.2 Water Management | |
| E1.2.1 Water Conservation | Not applicable |
| E1.2.2 Managing Stormwater within the Site | Yes |
| E1.2.3 On-Site Detention of Stormwater | Yes |
| E1.2.4 Stormwater Treatment | Not applicable |
| E1.2.5 Water Disposal | Yes |
| E1.2.6 Building in the vicinity of a Public Drainage System | Not applicable |
| E1.2.7 Wastewater Management | Yes |
| E1.3 Hazard Management | Not applicable |
| Part F: Food | Not applicable |
| Part G: Site Specific Controls | Not applicable |

The following provides discussion of the relevant issues:

C1.4 - Heritage

The use of the colours Dulux Raku and Monument are not supported as they are not sympathetic to the historic built context. A condition of development consent has been imposed to require the use of lighter toned colours.

C1.12 - Landscaping

Insufficient room is provided in the current plans for the plantings proposed in the landscape plan to grow to maturity. Issues relating to the trees and landscaping have been discussed earlier in this report at Part 5(a)(iv).

C3.2 Site Layout and Building Design

Building envelope / Building location zone

The building envelope that applies in the Birchgrove distinctive neighbourhood is based on a 6 metre wall height and the proposal complies with this control.

Building location zone (BLZ) is the part of the subject site where it can be reasonably expected that a building can be located and is defined by the front and rear setbacks of adjacent dwellings. The proposal complies with the applicable building location zone.

Side setback

Dwelling 1 has a maximum height of 7.2 metres (which relates to the existing dwelling) and a maximum height of 6.1 m for the proposed works and is built to the south-western boundary. Dwelling 2 has a maximum height of 6.4 metres and is set back 510 mm from the north-eastern boundary. Buildings of such height are required to be setback approximately 2-2.5 metres under this control, thus the proposal does not comply with the side setback control graph.

Notwithstanding, the non-compliance is considered to be acceptable for the following reasons:

- The pattern of development within the streetscape is not compromised; Birchgrove Road contains many dwellings which are built to one or both side boundaries.
- The bulk and scale of the development has been minimised.
- The siting of the dwelling adjacent to similarly sized dwellings will ensure that the dwelling will not result in adverse impacts in terms of bulk and scale.
- The non-compliance with the side setback control does not result in adverse amenity impacts for adjoining properties.
- Reasonable access is maintained for the necessary maintenance of adjoining properties as they have access to their side walls from their own properties.

One submission received states that *“the proposed north-west well and fence will visually dominate our property [111 Birchgrove Road] and convert our entry way into a permanently damp and dark space. This will further impact on circulation and breeze ventilation.”* It is noted that the semi-detached dwelling at 111 Birchgrove Road is entered from the side setback adjacent to the subject site. Notwithstanding, the proposal does not result in undue impacts, with the proposed dwelling being setback 510 mm from the mutual boundary providing a separation of 1.6 m between the dwellings which is not uncommon in the municipality and not dissimilar to the setback between the neighbouring semi at 113 Birchgrove Road and its neighbour.

C3.8 – Private Open Space

This control requires a minimum of 16 sqm of private open space with a minimum dimension of 3m directly connected to the principal indoor living area to be provided for dual occupancies. The deck adjacent to the living room of Dwelling 1 has a depth of only 1.2 m, which does not meet the objectives of the private open space controls. In order to achieve better indoor-outdoor connection, it is recommended that the rear wall of the Dwelling 1 be relocated approximately 1.2 m closer to Birchgrove Road to align with the rear alignment of Dwelling 2. This would allow the private open space to be increased whilst also retaining a landscape area which is associated with dwelling 1, to be consistent with the surrounding local.

C3.9- Solar Access

The relevant controls regarding the provision of solar access to neighboring properties are as follows:

C14 Where the surrounding allotments side boundary is 45 degrees from true north and therefore the allotment is not orientated north/south or east-west, glazing serving main living room shall retain a minimum of two hours of solar access between 9am and 3pm at the winter solstice.

C16 Where surrounding dwellings have south facing private open space ensure solar access is retained for two hours between 9am and 3pm to 50% of the total area during the winter solstice.

A submission received from the owners of 111 Birchgrove Road, Birchgrove advises that *the proposal if built as proposed will take all sun from our rear open private space.*

It is noted that 111 Birchgrove Road is located to the west of the subject site and the submitted shadow diagrams only show additional overshadowing of this property at 3 pm in winter. While the controls outlined above are not met as 50% of the private open space of 111 Birchgrove Road does not currently receive solar access for two hours, the proposal only reduces the solar access to, by 1.2 m² at 2pm. Solar access will however be available to the rear yard between 9 am and 1 pm (5 hours) to an average area of 4.5 m². As such, the proposal meets the objectives in minimising the degree of overshadowing to the neighbouring property.

It is noted that the subject dwellings do not have solar access to more than 50% of their private open space for more than 3 hours in winter, however this is a result of the site orientation. Adequate solar access is provided to the main living area of the new dwelling and the front yards of the new dwelling and front verandah of the existing dwelling obtain solar access throughout the day.

C3.10 - Views

Submissions were received from two properties advising that the proposal will adversely impact on views currently obtained from their dwellings. The properties the submissions came from were 30 and 32 Thomas Street, Birchgrove which are located to the rear of the subject site, with their ground level approximately 2 m above the subject site.

The Statement of Environmental Effects submitted with the application concluded that there was no impact on views however a photomontage was not provided to back up this claim. Council's assessment officer undertook a site inspection of 32 Thomas Street, Birchgrove and photographs taken at that site inspection have been used (in addition to the submitted photomontages and photographs provided by the property owner) to assess the impact of the proposal on neighbouring views. Photomontages were received in response to Council's request for additional information and are assessed below.

This part of the DCP states that *"a reference to views is a reference to water views and views of significant landmarks (e.g. Sydney Harbour, Sydney Harbour Bridge, ANZAC Bridge and the City skyline including features such as Sydney Tower). Such views are more highly valued than district views or views without significant landmarks".* This assessment is further refined in the planning principles outlined in Tenacity as follows: *Water views are valued more highly than land views. Iconic views (e.g. of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, e.g. a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

Views as defined above, are not considered to be obtained from 30 Thomas Street, in the photographs submitted. See below for photos submitted from first floor of 30 Thomas Street:



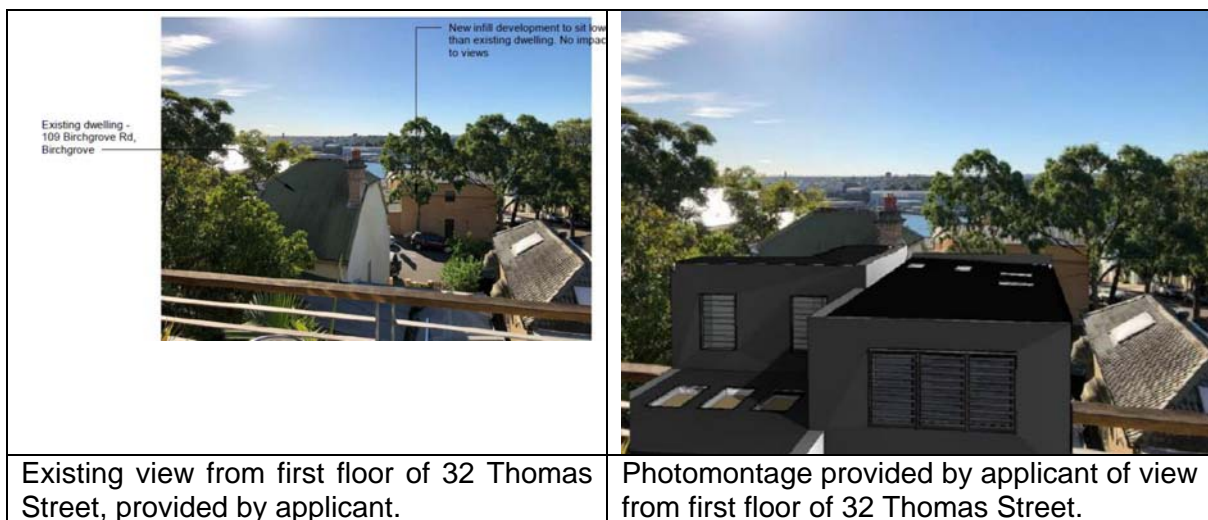
An assessment of the views available from 32 Thomas Street in the steps outlined in the planning principle established by Tenacity follows:

Ground floor: Water views and views of the land/water interface are currently available from the kitchen and rear yard of 32 Thomas Street (see below).



These views are obtained from a standing but not sitting position.

First floor: Water views and views of the land/water interface are currently available from the first floor bedroom / living area of 32 Thomas Street (see below).



These views are obtained from a standing and seated position.

While there would be a moderate impact on the views from the ground floor, the view from the first floor is not affected by the proposal.

The proposal is considered to be reasonable as it complies with the site coverage, landscaped area and floor space ratio development standards and has a lot size commensurate with surrounding development. Any two storey development on the site will impact upon views obtained from the ground floor of 32 Thomas Street. Setting the addition back from the side boundary enables part of this view to be retained. The first floor views are more panoramic and are not affected by the proposal due to the use of a flat roof and lower floor to ceiling heights for Dwelling 2. It is considered that the proposal results in view sharing and complies with the relevant controls in this regard.

C3.11 – Visual Privacy

Concern was raised that the first floor rear facing windows of each dwelling will have adverse privacy impacts for the dwellings at 30 and 32 Thomas Street, Birchgrove and that screening measures are required. It is agreed that screening is required and while external shutters are shown on the plans, a condition of consent will be imposed to ensure they comply with the requirements of this part.

5(d) The Likely Impacts

The assessment of the Development Application demonstrates that, subject to the recommended conditions, the proposal will have minimal impact in the locality.

5(e) The suitability of the site for the development

The site is zoned R1 – General Residential. Provided that any adverse effects on adjoining properties are minimised, this site is considered suitable to accommodate the proposed development, and this has been demonstrated in the assessment of the application.

5(f) Any submissions

The application was notified in accordance with Part A3.3 of Leichhardt Development Control Plan 2013 for a period of 14 days to surrounding properties. A total of four submissions were received which included six letters / emails from four properties.

The following issues raised in submissions have been discussed in this report:

- View impact – see Section 5(c) – C3.10 – Views
- Subdivision – see Section 5(a)(v) – Clause 4.6 - Subdivision
- Privacy - see Section 5(c) – C3.11 – Visual privacy
- Overshadowing - see Section 5(c) – C3.9 – Solar access
- Bulk and scale - see Section 5(c) – C3.2 – Site Layout and Building Design
- Compliance with development standards– see Section 5(a)(v) – Leichhardt Local Environmental Plan 2013

In addition to the above issues, the submissions raised the following concerns which are discussed under the respective headings below:

Issue: The applicant is a developer, has left the property vacant.

Comment: These are not relevant considerations in the assessment of the application.

Issue: The applicant has already illegally removed trees without Council approval.

Comment: Noted. The prior works are being investigated by Council's Ranger Services; any action taken will be independent of the development application process. Notwithstanding, the consent requires the planting of two trees and the retention of the

existing Bangalow palm. See previous comments in Part 5(a)(iv) of this report for further details.

Issue: The application is an overdevelopment.

Comment: The proposal complies with the relevant development standards, is compatible with development in the locality and does not result in significant adverse impact; accordingly it is not considered to be an overdevelopment.

Issue: Demolition and construction works close to the boundary is likely to affect surrounding dwelling and services such as the sewer line, drainage and retaining walls.

Comment: Developments commonly build to the boundary without damaging surrounding properties. It is noted that the builder / developer are responsible for any damage they cause however this is a civil matter and not within Council's jurisdiction. Suitable conditions are recommended to mitigate construction impacts on the surrounding area.

Issue: *I would like any development approval to stipulate that any changes and any damage to my walls, foundations and services be entirely paid for by the developer.*

Comment: This is a civil matter. The benefits of carrying out a dilapidation report of neighbouring properties will be included as an advisory note on the consent.

Issue: *I would like to see flat-roof designs rather than pitched roof designs to reduce the compromise to our views.*

Comment: The proposal uses a combination of a skillion (flat) roof to the rear and pitched roof to Birchgrove Road, in order to balance the competing issues of view retention, bulk and scale, minimising overshadowing, streetscape and heritage.

5(g) The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed. The proposal is not contrary to the public interest.

6 Referrals

6(a) Internal

The application was referred to the following internal sections/officers and issues raised in those referrals have been discussed in section 5 above.

- Heritage Officer
- Development Engineer
- Landscape

7. Section 7.11 Contributions

Section 7.11 contributions are payable for the proposal.

The carrying out of the development would result in an increased demand for public amenities and public services within the area. A financial contribution would be required for the development under Leichhardt Section 94 Contributions Plans as follows:

| Column A | Column B |
|-----------------------------------|--------------------|
| Open space and recreation | \$19,283.00 |
| Community facilities and services | \$1,949.00 |
| Access to Balmain peninsula | \$441.51 |
| Bicycle works | \$10.73 |
| Total Contribution | \$21,684.24 |

A condition requiring that contribution to be paid is included in the recommendation.

Note

Pursuant to the Ministerial Direction on Local Infrastructure Contributions dated 3 March 2011:

- (2) *A council (or planning panel) must not grant development consent (other than for development on land identified in Schedule 2) subject to a condition under section 94 (1) or (3) of the Environmental Planning and Assessment Act 1979 requiring the payment of a monetary contribution that:*

- (a) in the case of a development consent that authorises one or more dwellings, exceeds \$20000 for each dwelling authorised by the consent, or*
(b) in the case of a development consent that authorises subdivision into residential lots, exceeds \$20 000 for each residential lot authorised to be created by the development consent.

In this instance the consent authorises two dwellings (notwithstanding a credit is given for one existing dwelling), and hence Council may not impose a condition that requires payment in excess of \$40,000.

A condition requiring that the contribution be paid will be imposed on any consent granted.

8. Conclusion

The proposal generally complies with the aims, objectives and design parameters contained in Leichhardt Local Environmental Plan 2013 and Leichhardt Development Control Plan 2013. The development will not result in any significant impacts on the amenity of adjoining premises and the streetscape. The application is considered suitable for approval subject to the imposition of appropriate conditions.

9. Recommendation

- A. The variation to 4.1 Minimum Subdivision Lot Size of Leichhardt Local Environmental Plan 2013 be supported under the provisions of Clause 4.6 exceptions to development standards.
- B. That Council, as the consent authority pursuant to s4.16 of the Environmental Planning and Assessment Act 1979, grant consent to Development Application No: D/2018/58 for part demolition, ground floor and first floor alterations and additions to existing dwelling, subdivision, construct a new two storey dwelling on the newly created lot, and associated works, including new fencing, landscaping and tree removal at 109 Birchgrove Road, Birchgrove subject to the conditions listed in Attachment A below.

Attachment A – Recommended conditions of consent

CONDITIONS OF CONSENT

1. Development must be carried out in accordance with Development Application No. D/2018/58 and the following plans and supplementary documentation, except where amended by the conditions of this consent.

| Plan Reference | Drawn By | Dated |
|--|---------------------------|----------|
| Ground floor demolition plan DA03-F | Raymond Panetta Architect | 24.04.18 |
| Level 1 Demolition plan DA04-F | Raymond Panetta Architect | 24.04.18 |
| Roof – Demolition plan DA05-F | Raymond Panetta Architect | 24.04.18 |
| Northern and Eastern elevations – Demolition plan DA06-F | Raymond Panetta Architect | 24.04.18 |
| Southern and Western elevations – Demolition plan DA07-F | Raymond Panetta Architect | 24.04.18 |
| Sections – Demolition DA08-F | Raymond Panetta Architect | 24.04.18 |
| Proposed Ground floor plan DA09-F | Raymond Panetta Architect | 24.04.18 |
| Proposed Level 1 plan DA10-F | Raymond Panetta Architect | 24.04.18 |
| Proposed Roof plan DA11-F | Raymond Panetta Architect | 24.04.18 |
| Proposed Northern and Eastern elevations DA12-F | Raymond Panetta Architect | 24.04.18 |
| Proposed Southern and Western elevations DA13-F | Raymond Panetta Architect | 24.04.18 |
| Proposed sections DA14-F | Raymond Panetta Architect | 24.04.18 |
| Proposed sections DA15-F | Raymond Panetta Architect | 24.04.18 |
| Planter box details DA16-F | Raymond Panetta Architect | 24.04.18 |
| Subdivision plan DA18-G | Raymond Panetta Architect | 25.06.18 |

| Document Title | Prepared By | Dated |
|--|---------------------------|------------|
| BASIX Certificate 886718M | GAT and Associates | 31/1/2018 |
| BASIX Certificate A302967 | Raymond Panetta | 14/12/2017 |
| Materials and Finishes Schedule DA19-F | Raymond Panetta Architect | 24.04.18 |
| NatHERS Certificate 0002420032 | GAT and Associates | 31/1/2018 |

In the event of any inconsistency between the approved plans and the conditions, the conditions will prevail.

Where there is an inconsistency between approved elevations and floor plan, the elevation shall prevail.

In the event of any inconsistency between the approved plans and supplementary documentation, the plans will prevail.

The existing elements (walls, floors etc) shown to be retained on the approved plans shall not be removed, altered or rebuilt without prior consent of the consent authority.

Note: Carrying out of works contrary to the above plans and/ or conditions may invalidate this consent; result in orders, on the spot fines or legal proceedings.

2. Approval is given for the following works to be undertaken to trees on the site:

| Tree/location | Approved works |
|--|----------------|
| <i>Persea americana</i> (Avocado) located at the rear of the site | Removal |
| <i>Murraya paniculata</i> (Murraya) located at the rear of the site. | Removal |

Removal or pruning of any other tree (that would require consent of Council) on the site is not approved.

DEMOLITION CONDITIONS

The following conditions are imposed to ensure compliance with relevant legislation and Australian Standards, and to ensure that the amenity of the neighbourhood is protected. A Construction Certificate is not required for Demolition.

3. At least 7 days before any demolition work commences:
- the Council must be notified of the following particulars:
 - the name, address, telephone contact details and licence number of the person responsible for carrying out the work; and
 - the date the work is due to commence and the expected completion date; and
 - a written notice must be placed in the letter box of each directly adjoining property identified advising of the date the work is due to commence.
4. Unless otherwise approved by Council, demolition works shall only be permitted between the hours of 7:00am to 5.00pm, Mondays to Fridays (inclusive) with no demolition permitted on Saturdays, Sundays or Public Holidays.
5. All demolition work is to be carried out in accordance with the requirements of the relevant Australian Standard(s).
6. Where asbestos is present during demolition work, the work must be carried out in accordance with the guidelines for asbestos work published by Safework NSW.
7. All asbestos wastes must be disposed of at a landfill facility licensed by the New South Wales Environmental Protection Authority to receive that waste. Copies of the disposal dockets must be retained by the person performing the work for at least 3 years and be submitted to Council on request.
8. A Recycling and Waste Management Plan (RWMP) being prepared in accordance with the relevant Development Control Plan and submitted to and accepted by the PCA before work commences (including any demolition works).
9. All demolition waste must be transported to a facility or place that can lawfully be used as a waste facility for those wastes.
10. Council and the Principal Certifying Authority (if Council is not the PCA) must be notified as soon as practicable if any information is discovered during demolition or construction work that has the potential to alter previous conclusions about site contamination.

PRIOR TO THE ISSUE OF A CONSTRUCTION CERTIFICATE

11. The trees identified below are to be retained:

| Tree/location |
|--|
| <i>Archontophoenix cunninghamiana</i> (Bangalow Palm) located at the rear of the site. |

Details of the trees to be retained must be included on the Construction Certificate plans.

12. Amended plans are to be submitted incorporating the following amendments:

- a) In relation to the proposed external materials and finishes, the proposed roofing shall comprise of either *traditional corrugated galvanised steel* or *pre - coloured traditional corrugated metal* finished in a colour equivalent to colorbond colours - “Windspray” or “Wallaby” which complement the colour of weathered traditional metal roofs within the district;
- b) The proposed use of the unsympathetic dark coloured timber wall cladding - Dulux “Raku” is not permitted and as an alternative, the cladding shall be completed in a more sympathetic lighter tone colour equivalent to these alternative Dulux colours: which are in the same colour range as “Raku” – “Pipe Clay PN2E5”; “Unforgettable PN2E4”; “White Duck Half PN2E3”; or “Rottnest Island PN2E2”; and
- c) With the exception of any balustrading, the proposed “Monument” colour for the windows and door frames is to be changed to a lighter mid – tone colour.
- d) The rear wall of Dwelling 1 must be relocated approximately 1.2 m closer to Birchgrove Road to align with the rear alignment of Dwelling 2.

Details demonstrating compliance with the requirements of this condition are to be marked on the plans and be submitted to the Principal Certifying Authority’s satisfaction prior to the issue of any Construction Certificate.

13. Before the issue of any Construction Certificate amended plans must be submitted to the Certifying Authority’s satisfaction indicating the rear facing first floor windows (i.e. ensuite of Dwelling 1 and upstairs bedroom of Dwelling 2) being amended in the following manner:
- (i) Fixed and obscure glazing to a minimum level of 1.6 metres above the floor level; or
 - (ii) Suitable externally fixed screening with a minimum block out density of 75% to a level of 1.6 metres above the floor level.
14. A landscape plan prepared by a qualified Landscape Architect or Landscape Consultant must be provided prior to the issue of a Construction Certificate. The plan must include:
- a) Location of all proposed and existing planting delineating existing trees to be retained, removed or transplanted.
 - b) A detailed planting schedule including species by botanical and common names, quantities, pot sizes and estimated size at maturity.
 - c) At least 85% of the plantings must be native species from the Sydney locale.

- d) Three canopy trees capable of achieving a mature height of at least six (6) metres are to be provided with one at the front of the property and two at the rear.
- e) Details of planting procedure including available soil depth.
- f) Details of earthworks including mounding, retaining walls, and planter boxes (consistent with the approved architectural plans).
- g) A landscape maintenance strategy for the owner / occupier to administer over a twelve (12) month establishment period.
- h) Details of drainage and watering systems.

Details demonstrating compliance are to be shown on the plans submitted to the satisfaction of the Certifying Authority prior to the issue of the Construction Certificate.

15. The following replacement trees must be planted:

A minimum of 2 x 200 litre size additional trees, which will attain a minimum mature height of 6 metres, with one tree at the front of the property and one at the rear and shall be located a minimum of 1.5 metre from any property boundary and a minimum of 2.0 metres from any building.. The trees are to conform to AS2303—*Tree stock for landscape use*.

Details of the species and planting locations of the replacement plants must be included on the landscape plan and site plan prior to the issue of a Construction Certificate.

If the replacement trees are found to be faulty, damaged, dying or dead within twelve (12) months of planting then they must be replaced with the same species. If the trees are found dead before they reach a height where they are protected by Council's Tree Management Controls, they must be replaced with the same species.

16. Materials and finishes must be complementary to the predominant character and streetscape of the area, and any existing buildings & the period of construction of the buildings. New materials that are not depicted on the approved plans must not be used, except where modified by these conditions of consent. Highly reflective wall or roofing materials and glazing must not be used. Materials must be designed so as to not result in glare (maximum normal specular reflectivity of visible light 20%) or that causes any discomfort to pedestrians or neighbouring properties. Details of finished external surface materials, including colours and texture must be provided prior to the issue of a Construction Certificate to the satisfaction of the Principal Certifying Authority.
17. The person acting on this consent shall submit to the Principal Certifying Authority a dilapidation report including colour photos showing the existing condition of the footpath and roadway adjacent to the site before the issue of a Construction Certificate.
18. A stormwater drainage design, incorporating on site retention/ re-use facilities (OSR), prepared by a qualified practicing Civil Engineer must be provided prior to the issue of a Construction Certificate. The design must be prepared/amended to make provision for the following:

- a) The design must be generally in accordance with the stormwater drainage concept plan on Drawing No. 171030 C01 / Revision B prepared by Development Engineering Solutions and dated 2.5.2018.
- b) Comply with Council's Stormwater Drainage Code.
- c) Stormwater runoff from all roof and paved areas within the property must be collected in a system of gutters, pits and pipelines and be discharged together with overflow pipelines from any rainwater tank(s) by gravity to the kerb and gutter of a public road or directly into Council's piped drainage system. Charged or pump-out stormwater drainage systems are not permitted.
- d) The design must make provision for the natural flow of stormwater runoff from uphill/upstream properties/lands. The design must include the collection of such waters and discharge to the Council drainage system.
- e) An overland flowpath must be provided within the setback to the eastern boundary between the rear of the eastern dwelling and the Birchgrove Road frontage. The rear courtyard must be graded so that bypass flows from the site drainage system are directed to the overland flowpath.
- f) A minimum 150mm step up must be provided between all external finished surfaces and adjacent internal floor areas.
- g) As there is no overland flow/flood path available from the rear courtyard of the western dwelling to the Birchgrove Road frontage, the design of the sag pit and piped drainage system is to meet the following criteria:
 - i) Capture and convey the 100 year Average Recurrence Interval flow from the contributing catchment assuming 80% blockage of the inlet and 50% blockage of the pipe.
 - ii) The maximum water level over the sag pit shall not be less than 300mm below the floor level or damp course of the building
 - iii) The design must make provision for the natural flow of stormwater runoff from uphill/upstream properties/lands.
- h) All plumbing within the site must be carried out in accordance with Australian Standard *AS/NZS3500.3.2015 Plumbing and Drainage – Stormwater Drainage*.
- i) All underground water tanks shall comply with all relevant Australian Standards including AS2865, AS3500, AS3600 and AS3996.
- j) Step irons must be provided within all stormwater pits/tanks greater than 1200mm deep.
- k) The stormwater system must not be influenced by backwater effects or hydraulically controlled by the receiving system.
- l) Plans must specify that any components of the existing system to be retained must be certified during construction to be in good condition and of adequate capacity to convey the additional runoff generated by the development and be replaced or upgraded if required.
- m) An inspection opening or stormwater pit must be installed inside the property adjacent to the boundary for all stormwater outlets.

- n) All redundant stormwater pipelines within the footpath area must be removed and the footpath and kerb reinstated.
- o) New pipelines within the footpath area that are to discharge to the kerb and gutter must be hot dipped galvanised steel hollow section with a minimum wall thickness of 4.0mm and a section height of 100mm.
- p) New kerb outlets in stone kerb shall be carefully cored through the existing kerb stone such that the kerb outlet is perpendicular (a 90° angle) with the gutter. The pipe under the footpath shall end 30mm within the kerb stone with mass concrete around the pipe connection to the kerb stone.

Purpose made pipe fittings and bends or welded joints shall be used where necessary to align the discharge pipe with the kerb outlet.

- q) Only a single point of discharge is permitted to the kerb and gutter, per frontage of the site.
- r) The proposed on-site retention tanks must be connected to a pump system for internal reuse for laundry purposes, the flushing of all toilets and for outdoor usage such as irrigation.
- s) Surface water must not be drained to rainwater tanks where the collected water is to be used to supply water inside the dwelling, such as for toilet flushing or laundry use.
- t) Water quality filtration basket(s) with screening bag or similar primary treatment device(s) shall be installed on the site stormwater drainage system such that all water entering the site stormwater drainage system is filtered by the device(s).
- u) The 2.75m³ underground rainwater tank proposed in the front yard of the eastern dwelling must be relocated to under the rear deck. It must be located appropriately such that it is accessible for maintenance.

The design must be certified as compliant with the terms of this condition by a suitably qualified Civil Engineer.

Details and plans demonstrating compliance are to be submitted and approved by Council prior to the issue of the Construction Certificate.

19. The front fence and retaining wall must be designed such that any necessary sub soil drainage system installed behind the wall discharges to the kerb and gutter via the piped site drainage system. No weep holes are permitted to Councils footpath.

Details demonstrating compliance with the requirements of this condition are to be submitted to the satisfaction of the Certifying Authority prior to the issue of any Construction Certificate.

20. In accordance with Section 34 of the *Building and Construction Industry Long Service Payments Act 1986*, the person acting on this consent must pay a long service levy at the prescribed rate of 0.35% of the total cost of the work to either the Long Service Payments Corporation or Council for any work costing \$25,000 or more. The Long Service Levy must be paid before to the issue of a Construction Certificate.

21. A contribution pursuant to the provisions of Section 7.11 of the *Environmental Planning and Assessment Act 1979* for the services detailed in column A and for the amount detailed in column B must be made to Council prior to the issue of a Construction Certificate:

| Column A | Column B |
|-----------------------------------|--------------------|
| Open space and recreation | \$19,283.00 |
| Community facilities and services | \$1,949.00 |
| Access to Balmain peninsula | \$441.51 |
| Bicycle works | \$10.73 |
| Total Contribution | \$21,684.24 |

Payment will only be accepted in the form of cash, bank cheque or EFTPOS / Credit Card (to a maximum of \$10,000). It should be noted that personal cheques or bank guarantees cannot be accepted for Section 7.11 Contributions. Contribution Plans may be inspected on Council's website www.leichhardt.nsw.gov.au or a copy purchased at the Customer Service counter in Council's Administration Centre, 7-15 Wetherill Street, Leichhardt, during business hours.

A receipt demonstrating compliance with the requirements of this condition are to be submitted to the satisfaction of the Certifying Authority prior to the issue of any Construction Certificate.

22. Prior to the issue of the Subdivision or Construction Certificate in connection with a development, the developer (whether or not a constitutional corporation) is to provide evidence satisfactory to the Certifying Authority that arrangements have been made for:
- (i) the installation of fibre-ready facilities to all individual lots and/or premises in a real estate development project so as to enable fibre to be readily connected to any premises that is being or may be constructed on those lots. Demonstrate that the carrier has confirmed in writing that they are satisfied that the fibre ready facilities are fit for purpose.
 - (ii) the provision of fixed-line telecommunications infrastructure in the fibre-ready facilities to all individual lots and/or premises in a real estate development project demonstrated through an agreement with a carrier.
23. The approved plans must be checked online with Sydney Water Tap In to determine whether the development will affect Sydney Water's sewer and water mains, stormwater drains and/or easements, and if further requirements need to be met. A copy of this approval must be supplied with the Construction Certificate application. Please refer to the web site <http://www.sydneywater.com.au/tapin/index.htm> for details on the process or telephone 132092.
- The Certifying Authority must ensure that the appropriate approval has been provided before the issue of a Construction Certificate.
24. Sediment control devices must be constructed and maintained in proper working order to prevent sediment discharge from the construction site. Sediment control plans and specifications must be submitted to the Principal Certifying Authority before the issue of a Construction Certificate.

PRIOR TO WORKS COMMENCING OR ISSUE OF A CONSTRUCTION CERTIFICATE (WHICHEVER OCCURS FIRST)

25. Where it is proposed to occupy or carry out works on public roads or Council controlled lands, the person acting on this consent shall obtain all applicable Permits from Council in accordance with Section 68 (Approvals) of the Local Government Act 1993 and/or Section 138 of the Roads Act 1993. Permits are required for the following activities:
- a) Work zone (designated parking for construction vehicles). Note that a minimum of 2 months should be allowed for the processing of a Work Zone application.
 - b) A concrete pump across the roadway/footpath
 - c) Mobile crane or any standing plant
 - d) Skip bins
 - e) Scaffolding/Hoardings (fencing on public land)
 - f) Public domain works including vehicle crossing, kerb & guttering, footpath, stormwater, etc.
 - g) Awning or street verandah over footpath
 - h) Partial or full road closure
 - i) Installation or replacement of private stormwater drain, utility service or water supply

Contact Council's Road Access team to ensure the correct Permit applications are made for the various activities.

Applications for such Permits shall be submitted and approved by Council prior to the commencement of the works associated with such activity or issue of the Construction Certificate (whichever occurs first). Details demonstrating compliance with the requirements of this condition are to be submitted to the satisfaction of the Principal Certifying Authority prior to the issue of any Construction Certificate.

26. Prior to the commencement of demolition works or a Construction Certificate being issued for works approved by this development consent (whichever occurs first), a security deposit and inspection fee must be paid to Council to cover the cost of making good any damage caused to any Council property or the physical environment as a consequence of carrying out the works and as surety for the proper completion of any road, footpath and drainage works required by this consent.

| | |
|-------------------------|------------|
| Security Deposit (FOOT) | \$7,860.00 |
| Inspection fee (FOOTI) | \$225.00 |

Payment will be accepted in the form of cash, bank cheque, EFTPOS/credit card (to a maximum of \$10,000) or bank guarantee. Bank Guarantees must not have an expiry date.

The inspection fee is required for Council to determine the condition of the adjacent road reserve and footpath prior to and on completion of the works being carried out.

Should any of Council's property and/or the physical environment sustain damage during the course of the demolition or construction works, or if the works put Council's assets or the environment at risk, or if any road, footpath or drainage works required by this consent are not completed satisfactorily, Council may carry out any works necessary to repair the damage, remove the risk or complete the works. Council may utilise part or all of the security deposit to restore any damages, and Council may recover, in any court of competent jurisdiction, any costs to Council for such restorations.

A request for release of the security may be made to the Council after all construction work has been completed and a final Occupation Certificate issued.

The amount nominated is only current for the financial year in which the consent was issued and is revised each financial year. The amount payable must be consistent with Council's Fees and Charges in force at the date of payment.

Requirements of this condition are to be met prior to works commencing or prior to release of a Construction Certificate (whichever occurs first). Details demonstrating compliance with the requirements of this condition are to be submitted to the satisfaction of the Principal Certifying Authority prior to the issue of any Construction Certificate.

PRIOR TO THE COMMENCEMENT OF WORKS

27. Any person acting on this consent or any contractors carrying out works on public roads or Council controlled lands shall take out Public Liability Insurance with a minimum cover of twenty (20) million dollars in relation to the occupation of, and approved works within those lands. The Policy is to note, and provide protection for Inner West Council, as an interested party and a copy of the Policy must be submitted to Council prior to commencement of the works. The Policy must be valid for the entire period that the works are being undertaken on public property.
28. A rigid and durable sign must be erected in a prominent position on the site, before work commences. The sign is to be maintained at all times until all work has been completed. The sign must include:
 - a) The name, address and telephone number of the PCA;
 - b) A telephone number on which Principal Contractor (if any) can be contacted outside working hours; and
 - c) A statement advising: 'Unauthorised Entry To The Work Site Is Prohibited'.
29. A Recycling and Waste Management Plan (RWMP) being prepared in accordance with the relevant Development Control Plan and submitted to and accepted by the PCA before work commences (including any demolition works).
30. A Construction Certificate must be obtained before commencing building work. Building work means any physical activity involved in the construction of a building. This definition includes the installation of fire safety measures.
31. The following facilities must be provided on the site:
 - (a) toilet facilities in accordance with WorkCover NSW requirements, at a ratio of one toilet per every 20 employees, and
 - (b) a garbage receptacle for food scraps and papers, with a tight fitting lid.

Facilities must be located so that they will not cause a nuisance.

DURING WORKS

32. Unless otherwise approved by Council, excavation, demolition, construction or subdivision work shall only be permitted during the following hours:
 - a) 7:00am to 6.00pm, Mondays to Fridays, inclusive (with demolition works finishing at 5pm);
 - b) 8:00am to 1:00pm on Saturdays with no demolition works occurring during this time; and
 - c) at no time on Sundays or public holidays.

Works may be undertaken outside these hours where they do not create any nuisance to neighbouring properties in terms of dust, noise, vibration etc. and do not entail the use of power tools, hammers etc. This may include but is not limited to painting.

In the case that a standing plant or special permit is obtained from Council for works in association with this development, the works which are the subject of the permit may be carried out outside these hours.

This condition does not apply in the event of a direction from police or other relevant authority for safety reasons, to prevent risk to life or environmental harm.

Activities generating noise levels greater than 75dB(A) such as rock breaking, rock hammering, sheet piling and pile driving shall be limited to:

8:00am to 12:00pm, Monday to Saturday; and
2:00pm to 5:00pm Monday to Friday.

The person acting on this consent shall not undertake such activities for more than three continuous hours and shall provide a minimum of one 2 hour respite period between any two periods of such works.

“Continuous” means any period during which there is less than an uninterrupted 60 minute respite period between temporarily halting and recommencing any of that intrusively noisy work.

Noise arising from the works must be controlled in accordance with the requirements of the *Protection of the Environment Operations Act 1997* and guidelines contained in the New South Wales Environment Protection Authority Environmental Noise Control Manual.

33. The area surrounding the building work must be reinstated to Council's satisfaction upon completion of the work.
34. The placing of any materials on Council's footpath or roadway is prohibited, without the consent of Council.
35. The works are required to be inspected at critical stages of construction, by the PCA or if the PCA agrees, by another Certifying Authority.
36. A certificate of survey from a registered land surveyor must be submitted to the PCA upon excavation of the footings and before the pouring of the concrete to verify that the structure will not encroach on the allotment boundaries.
37. The person acting on this consent must comply with the requirements of the Dividing Fences Act in respect to the alterations and additions to the boundary fences.
38. No activities, storage or disposal of materials taking place beneath the canopy of any tree protected under Council's Tree Management Controls at any time.
39. No trees on public property (footpaths, roads, reserves etc) are to be removed or damaged during works unless specifically approved in this consent or marked on the approved plans for removal.

Prescribed trees protected by Council's Management Controls on the subject property and/or any vegetation on surrounding properties must not be damaged or removed during works unless specific approval has been provided under this consent.

40. The rock shelf / outcrop in the rear yard is to be kept in its entirety and not excavated or otherwise modified.

PRIOR TO THE ISSUE OF AN OCCUPATION CERTIFICATE

41. You must obtain an Occupation Certificate from your PCA before you occupy or use the building. The PCA must notify the Council of the determination of the Occupation Certificate and forward the following documents to Council within 2 days of the date of the Certificate being determined:
- a) A copy of the determination;
 - b) Copies of any documents that were lodged with the Occupation Certificate application;
 - c) A copy of Occupation Certificate, if it was issued;
 - d) A copy of the record of all critical stage inspections and any other inspection required by the PCA;
 - e) A copy of any missed inspections;
 - f) A copy of any compliance certificate and any other documentary evidence relied upon in issuing the Occupation Certificate.
42. The subdivision of the land into 2 lots being registered at the NSW Land Registry Services before the issue of an Occupation Certificate.
43. The landscaping of the site must be carried out prior to occupation or use of the premises in accordance with the approved plan, and must be maintained at all times to Council's satisfaction.
44. The Certifying Authority must be satisfied that each of the commitments listed in BASIX Certificate referred to in this Determination have been fulfilled before the issue of an Occupation Certificate (whether an interim or final Occupation Certificate).
45. The Certifying Authority must apply to the Director-General for a BASIX Completion Receipt within 2 days of the issue of a final Occupation Certificate. Completion Receipts can be applied for at www.basix.nsw.gov.au.
46. Before the issue of an Interim or Final Occupation Certificate, a street number and identifier of separate occupancies (if applicable) must be clearly displayed in a readily visible location (numbers having a height of not less than 75mm). If any new street numbers or change to street numbers (this includes unit and shop numbers) are required they must have the prior approval of council before being displayed.
47. Prior to the issue of any Occupation Certificate, the Principal Certifying Authority is to be satisfied that all landscape works, including tree planting, have been undertaken in accordance with the approved plan(s) and conditions of consent. A copy of an active Landscape management plan/contract for the maintenance of the landscaping for a period of not less than two years after the installation is to be provided prior to the issue of the Occupation Certificate.
48. Prior to the issue of an Occupation Certificate, the Principa Certifying Authority must ensure that the stormwater drainage system has been constructed in accordance with the approved design and relevant Australian Standards.

Works-as-executed plans of the stormwater drainage system, certified by a Registered Surveyor, together with certification by a qualified practicing Civil Engineer to verify that the drainage system has been constructed in accordance with the approved design and relevant Australian Standards, shall be submitted and accepted by Council prior to the issue of an Occupation Certificate.

The works-as-executed plan(s) must show the as built details in comparison to those shown on the drainage plans approved with the Construction Certificate. All relevant levels and details indicated must be marked in red on a copy of the Principal Certifying Authority stamped Construction Certificate plans.

49. Prior to the issue of an Occupation Certificate, the Principal Certifying Authority must ensure that an Operation and Management Plan has been prepared and implemented for the on-site retention/re-use facilities. The Plan must set out the following at a minimum:

- a) The proposed maintenance regime, specifying that the system is to be regularly inspected and checked by qualified practitioners.
- b) The proposed method of management of the facility, including procedures, safety protection systems, emergency response plan in the event of mechanical failure, etc.

The Plan must be prepared by a suitably qualified professional and provided to the Principal Certifying Authority prior to the issue of an Occupation Certificate.

50. Prior to the issue of an Occupation Certificate, a positive covenant must be created under Section 88E of the Conveyancing Act 1919, burdening the owner(s) with the requirement to maintain the on-site retention/re-use facilities on the property.

The terms of the 88E instrument with positive covenant shall include, but not be limited to, the following:

- a) The Proprietor of the property shall be responsible for maintaining and keeping clear all pits, pipelines, trench barriers and other structures associated with the on-site retention/re-use facilities ("OSR").
- b) The Proprietor shall have the OSR inspected annually by a competent person.
- c) The Council shall have the right to enter upon the land referred to above, at all reasonable times to inspect, construct, install, clean, repair and maintain in good working order all pits, pipelines, trench barriers and other structures in or upon the said land which comprise the OSR or which convey stormwater from the said land; and recover the costs of any such works from the proprietor.
- d) The registered proprietor shall indemnify the Council and any adjoining land owners against damage to their land arising from the failure of any component of the OSR, or failure to clean, maintain and repair the OSR.

The proprietor or successor must bear all costs associated in the preparation of the subject 88E instrument. Proof of registration with NSW Land and Property Information must be submitted obtained. Details demonstrating compliance with the requirements of this condition are to be submitted to the satisfaction of the Principal Certifying Authority prior to the issuing of any Occupation Certificate.

51. Encroachments onto Council's road or footpath of any service pipes, sewer vents, boundary traps, downpipes, gutters, stairs, doors, gates, garage tilt up panel doors or any structure whatsoever shall not be permitted. Any encroachments on to Council road or footpath resulting from the building works will be required to be removed before the issue of the Occupation Certificate.

52. No weep holes are permitted to Council's footpath. Any weepholes to Council road or footpath resulting from the building works will be required to be removed before the issue of the Occupation Certificate.
53. The existing stone kerb adjacent to the site is of local heritage value and is to be preserved at no cost to Council. Any damage to the stone kerb will require the replacement of the damaged individual stone units before the issue of the Occupation Certificate.
54. You are advised that Council has not undertaken a search of existing or proposed utility services adjacent to the site in determining this application. Any adjustment or augmentation of any public utility services including Gas, Water, Sewer, Electricity, Street lighting and Telecommunications required as a result of the development shall be at no cost to Council and undertaken before the issue of an Occupation Certificate.

PRIOR TO THE ISSUE OF A SUBDIVISION CERTIFICATE

55. The Section 7.11 Contribution must be paid before the issue of a Subdivision Certificate.
56. The Section 73 Certificate must be submitted to the Principal Certifying Authority before the issue of a Subdivision Certificate.
 - a) A Section 73 Compliance Certificate under the Sydney Water Act 1994 must be obtained from Sydney Water Corporation. Make early application for the certificate, as there may be water and sewer pipes to be built and this can take some time. This can also impact on other services and building, driveway or landscape design.
 - b) Application must be made through an authorised Water Servicing Coordinator. For help either visit www.sydneywater.com.au > Plumbing, building and developing > Providers > Lists or telephone 13 20 92.

ONGOING CONDITIONS OF CONSENT

57. The premises shall not be used for any purpose other than that stated in the Development Application, i.e. dual occupancy (attached) without the prior consent of the Council unless the change to another use is permitted as exempt or complying development under *Leichhardt Local Environment Plan 2013* or *State Environmental Planning policy (Exempt and Complying Codes) 2008*.

The use of the premises as a dual occupancy (attached) is defined under the *Leichhardt Local Environmental Plan 2013*.

58. The canopy replenishment trees required by this consent are to be maintained in a healthy and vigorous condition until they attain a height of 6 metres whereby they will be protected by Council's Tree Management Controls. Any of the trees found faulty, damaged, dying or dead shall be replaced with the same species within 2 months
59. The Operation and Management Plan for the on-site retention/re-use facilities, approved with the Occupation Certificate, must be implemented and kept in a suitable location on site at all times.

PRESCRIBED CONDITIONS

A. BASIX Commitments

Under clause 97A of the Environmental Planning & Assessment Regulation 2000, it is a condition of this development consent that all the commitments listed in each

relevant BASIX Certificate for the development are fulfilled. The Certifying Authority must ensure that the building plans and specifications submitted by the Applicant, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

In this condition:

- a) Relevant BASIX Certificate means:
 - (i) a BASIX Certificate that was applicable to the development when this development consent was granted (or, if the development consent is modified under section 96 of the Act, a BASIX Certificate that is applicable to the development when this development consent is modified); or
 - (ii) if a replacement BASIX Certificate accompanies any subsequent application for a construction certificate, the replacement BASIX Certificate; and
- b) BASIX Certificate has the meaning given to that term in the Environmental Planning & Assessment Regulation 2000.

B. Building Code of Australia

All building work must be carried out in accordance with the provisions of the Building Code of Australia.

C. Home Building Act

- 1) Building work that involves residential building work (within the meaning and exemptions provided in the Home Building Act 1989) must not be carried out unless the Principal Certifying Authority for the development to which the work relates has given Leichhardt Council written notice of the following:
 - a) in the case of work for which a principal contractor is required to be appointed:
 - i) the name and licence number of the principal contractor, and
 - ii) the name of the insurer by which the work is insured under Part 6 of that Act, or
 - b) in the case of work to be done by an owner-builder:
 - i) the name of the owner-builder, and
 - ii) if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.
- 2) If arrangements for doing residential building work are changed while the work is in progress so that the information submitted to Council is out of date, further work must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council), has given the Council written notice of the updated information.

Note: A certificate purporting to be issued by an approved insurer under Part 6 of the Home Building Act 1989 that states that a person is the holder of an insurance policy issued for the purposes of that Part is, for the purposes of this clause, sufficient evidence that the person has complied with the requirements of that Part.

D. Site Sign

- 1) A sign must be erected in a prominent position on any work site on which work involved in the erection or demolition of a building is being carried out:
 - a) stating that unauthorised entry to the work site is prohibited;

- b) showing the name of the principal contractor (or person in charge of the work site), and a telephone number at which that person may be contacted at any time for business purposes and outside working hours; and
 - c) showing the name, address and telephone number of the Principal Certifying Authority for the work.
- 2) Any such sign must be maintained while to building work or demolition work is being carried out, but must be removed when the work has been completed.

E. Condition relating to shoring and adequacy of adjoining property

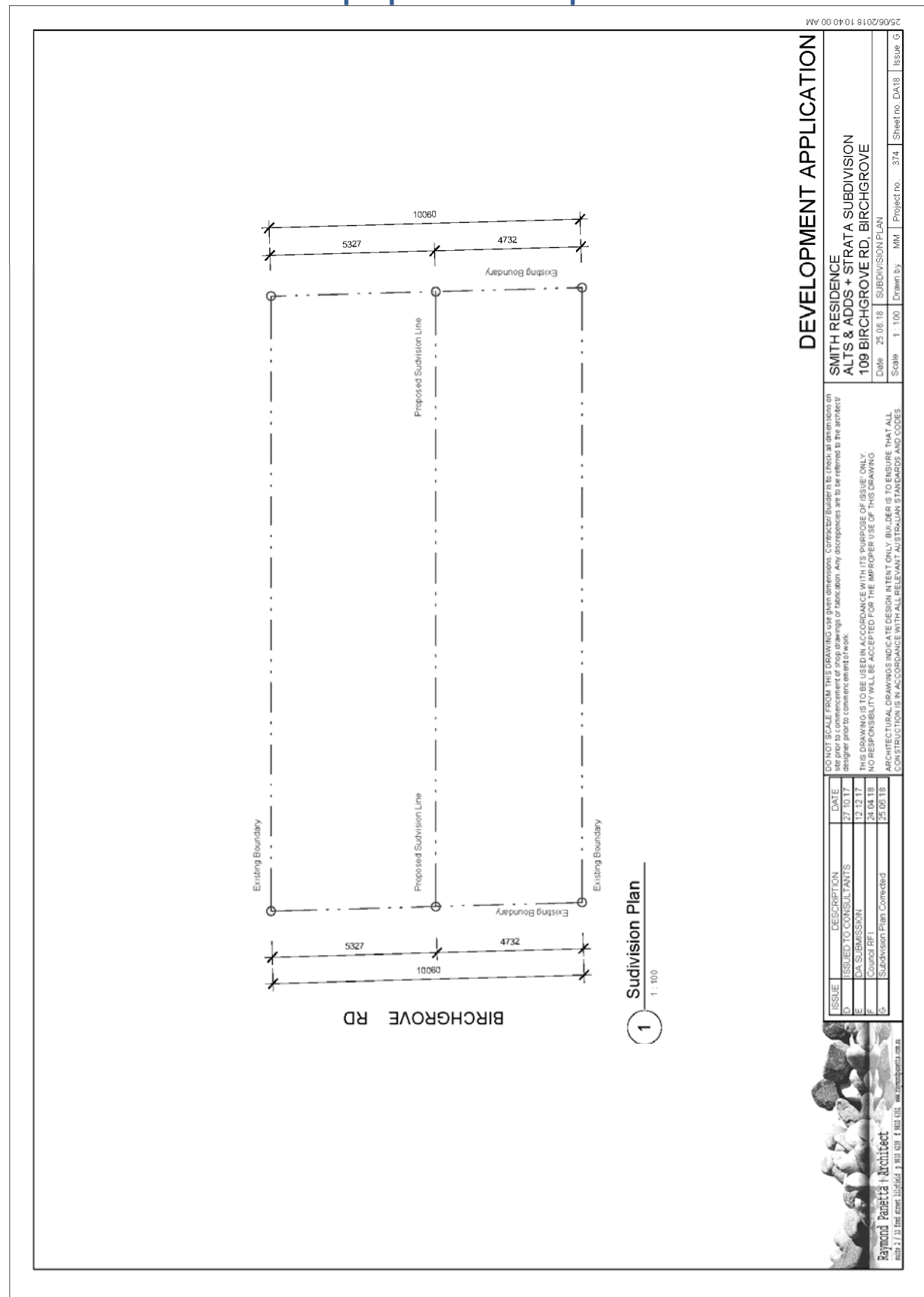
- (1) For the purposes of section 4.17(11) of [the Act](#), it is a prescribed condition of development consent that if the development involves an excavation that extends below the level of the base of the footings of a building on adjoining land, the person having the benefit of the development consent must, at the person's own expense:
- (a) protect and support the adjoining premises from possible damage from the excavation, and
 - (b) where necessary, underpin the adjoining premises to prevent any such damage.
- (2) The condition referred to in subclause (1) does not apply if the person having the benefit of the development consent owns the adjoining land or the owner of the adjoining land has given consent in writing to that condition not applying.

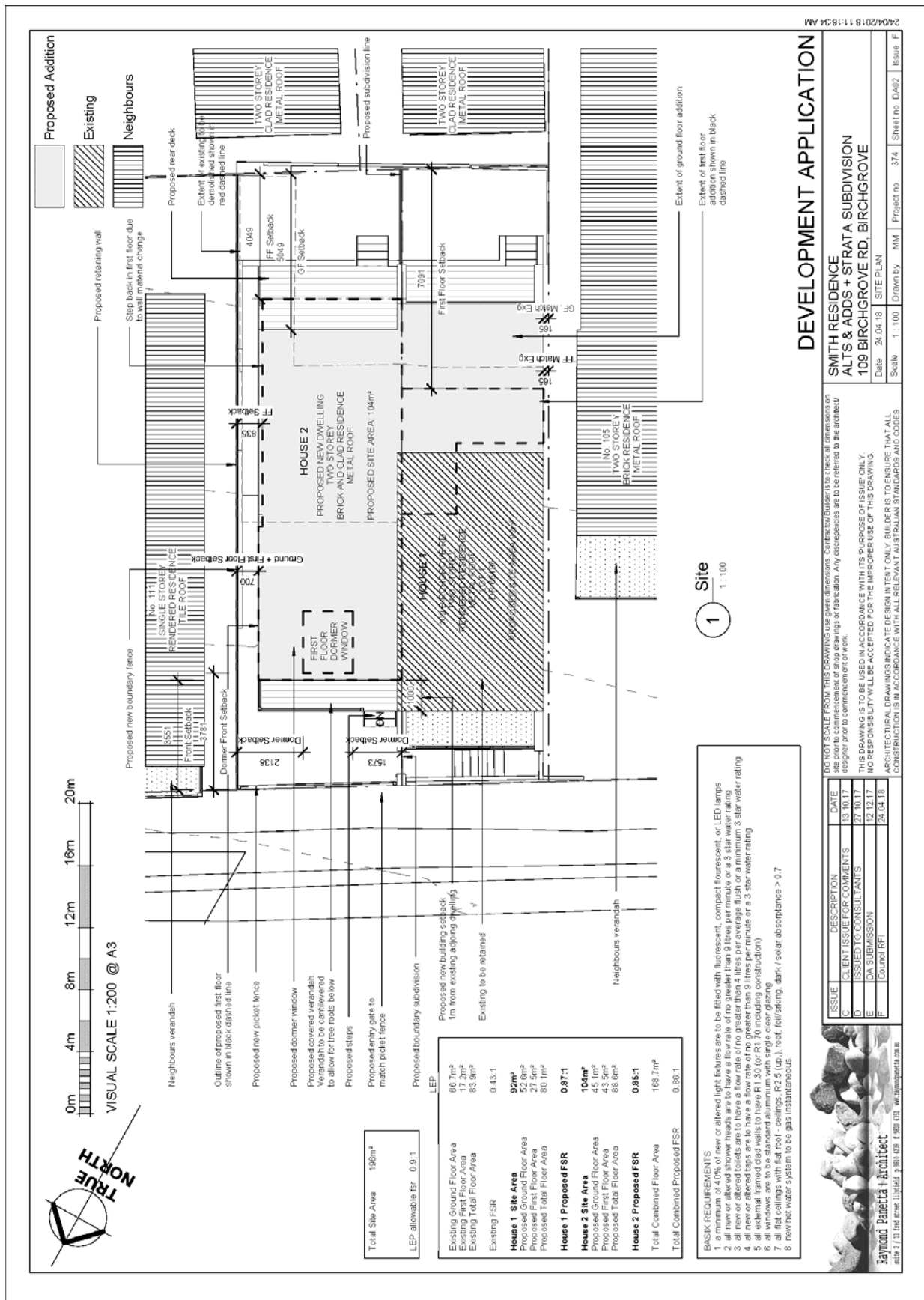
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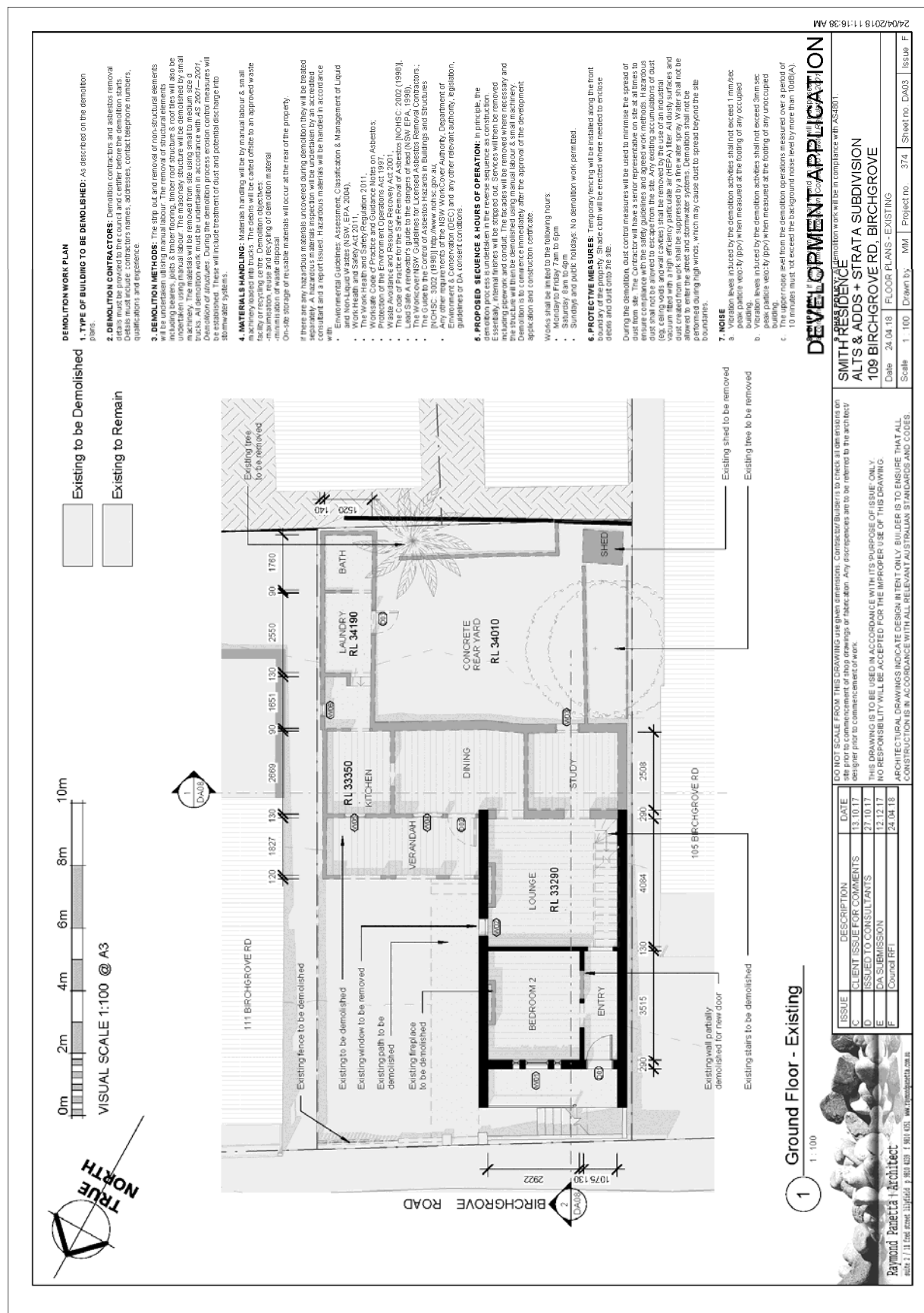
1. This Determination Notice operates or becomes effective from the endorsed date of consent.
2. Section 8.2 of the *Environmental Planning and Assessment Act 1979* provides for an applicant to request Council to review its determination. This does not apply to applications made on behalf of the Crown, designated development or a complying development certificate. The request for review must be made within six (6) months of the date of determination or prior to an appeal being heard by the Land and Environment Court. Furthermore, Council has no power to determine a review after the expiration of these periods. A decision on a review may not be further reviewed under Section 8.2.
3. If you are unsatisfied with this determination, Section 8.7 of the *Environmental Planning and Assessment Act 1979* gives you the right of appeal to the Land and Environment Court within six (6) months of the determination date.
4. Failure to comply with the relevant provisions of the *Environmental Planning and Assessment Act 1979* and/or the conditions of this consent may result in the serving of penalty notices or legal action.
5. Works or activities other than those approved by this Development Consent will require the submission of a new development application or an application to modify the consent under Section 4.55 of the *Environmental Planning and Assessment Act 1979*.
6. This decision does not ensure compliance with the *Disability Discrimination Act 1992*. Applicants should investigate their potential for liability under that Act.

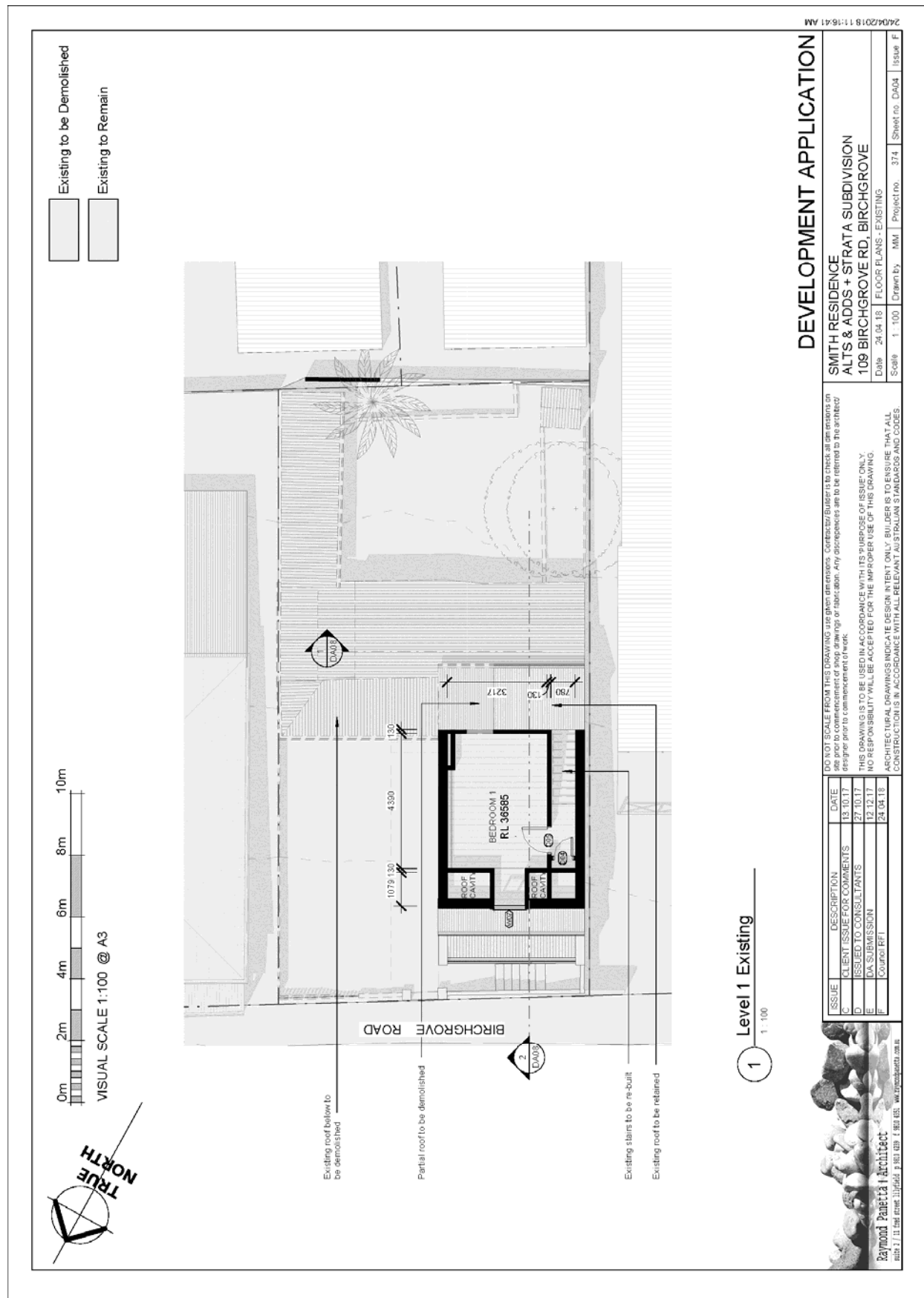
7. This development consent does not remove the need to obtain any other statutory consent or approval necessary under any other Act, such as (if necessary):
 - a) Application for any activity under that Act, including any erection of a hoarding.
 - b) Application for a Construction Certificate under the *Environmental Planning and Assessment Act 1979*.
 - c) Application for an Occupation Certificate under the *Environmental Planning and Assessment Act 1979*.
 - d) Application for a Subdivision Certificate under the *Environmental Planning and Assessment Act 1979* if land (including stratum) subdivision of the development site is proposed.
 - e) Application for Strata Title Subdivision if strata title subdivision of the development is proposed.
 - f) Development Application for demolition if demolition is not approved by this consent.
 - g) Development Application for subdivision if consent for subdivision is not granted by this consent.
 - h) An application under the Roads Act 1993 for any footpath / public road occupation. A lease fee is payable for all occupations.
8. Prior to the issue of the Construction Certificate, the applicant must make contact with all relevant utility providers (such as Sydney Water, Energy Australia etc) whose services will be impacted upon by the development. A written copy of the requirements of each provider, as determined necessary by the Certifying Authority, must be obtained.

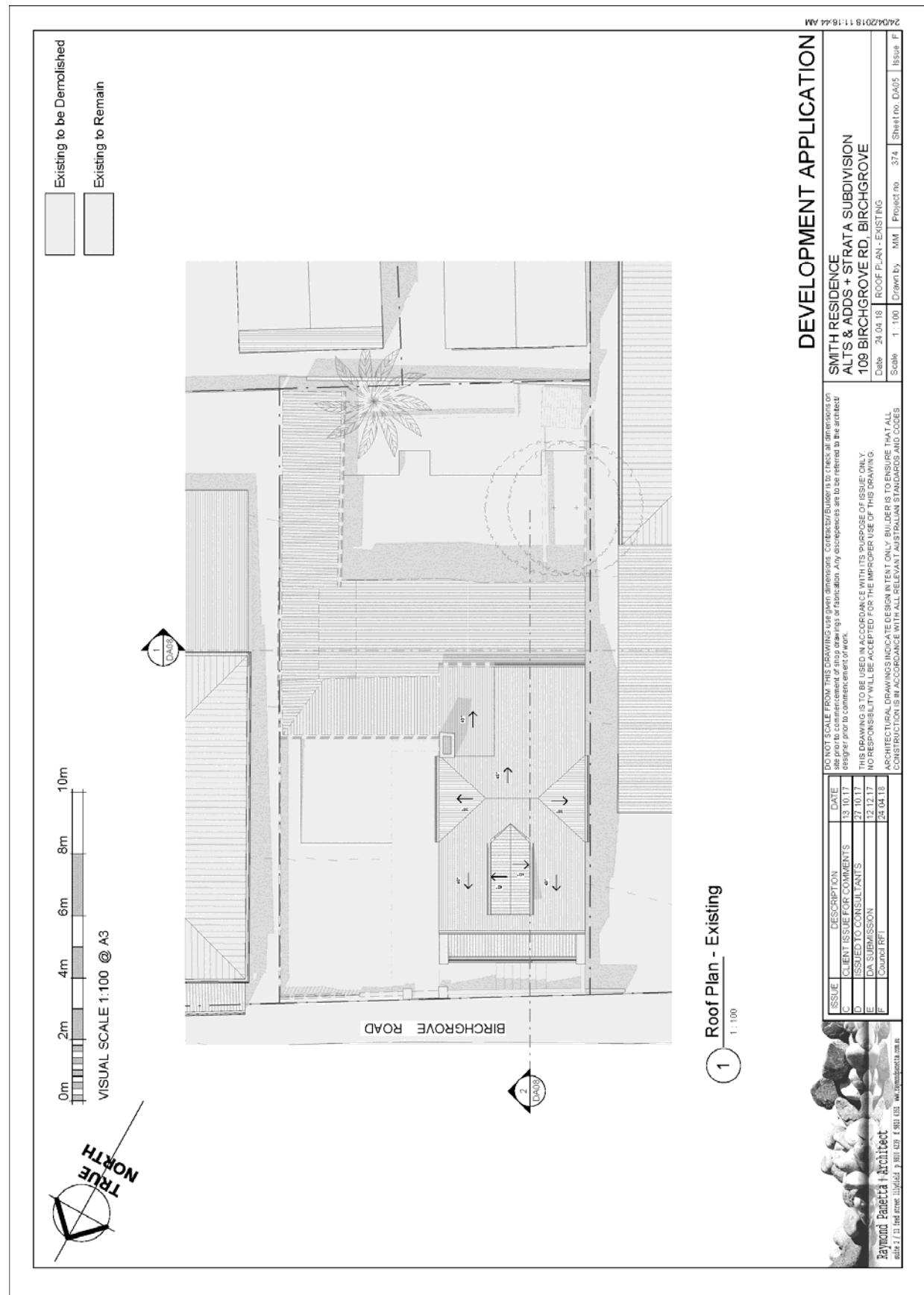
Attachment B – Plans of proposed development











1 North Elevation - Existing
1:100

2 East Elevation - Existing
1:100

DEVELOPMENT APPLICATION

**SMITH RESIDENCE
ALTS & ADDS + STRATA SUBDIVISION
109 BIRCHGROVE RD, BIRCHGROVE**

Date: 24.04.18
ELEVATIONS - EXISTING

Scale: 1:100
Drawn by: MM
Project no.: 374
Sheet no.: D405
Issue: F

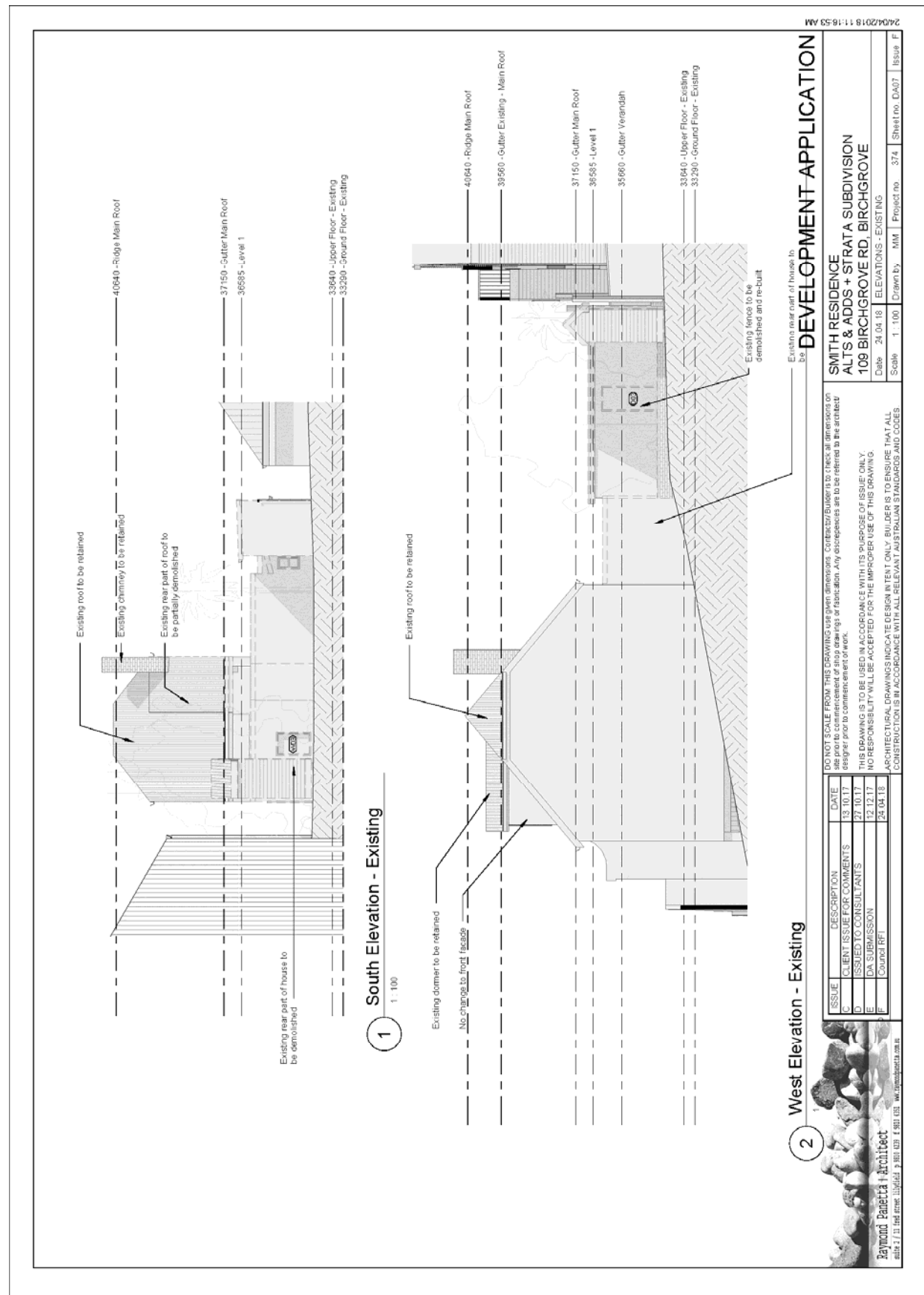
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THIS DRAWING IS TO BE USED IN ACCORDANCE WITH ITS PURPOSE OF ISSUE. ONLY NO RESPONSIBILITY WILL BE ACCEPTED FOR THE IMPROPER USE OF THIS DRAWING.

ARCHITECTURAL DRAWINGS INDICATE DESIGN INTENT ONLY. BUILDER IS TO ENSURE THAT ALL CONSTRUCTION IS IN ACCORDANCE WITH ALL RELEVANT AUSTRALIAN STANDARDS AND CODES.

| ISSUE | DESCRIPTION | DATE |
|-------|---------------------------|----------|
| C | CLIENT ISSUE FOR COMMENTS | 13.10.17 |
| D | ISSUED TO CONSULTANTS | 27.10.17 |
| E | DA SUBMISSION | 12.12.17 |
| F | Consult RFI | 24.04.18 |

Raymond Panetta Architect
24/27 JI THE EMPLOYEE 7 BEL AIR 8 900 USE www.raymondpanetta.com.au



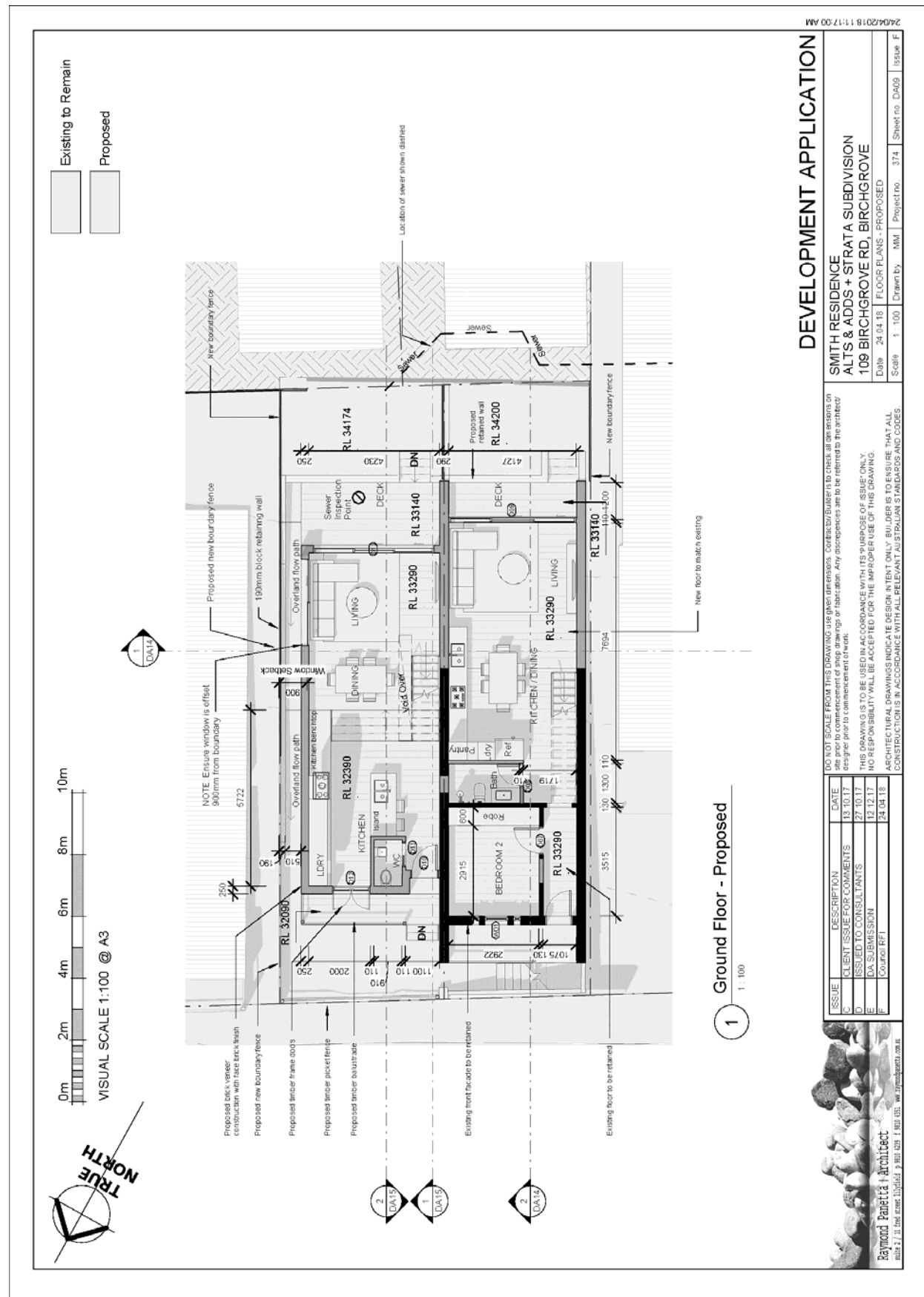


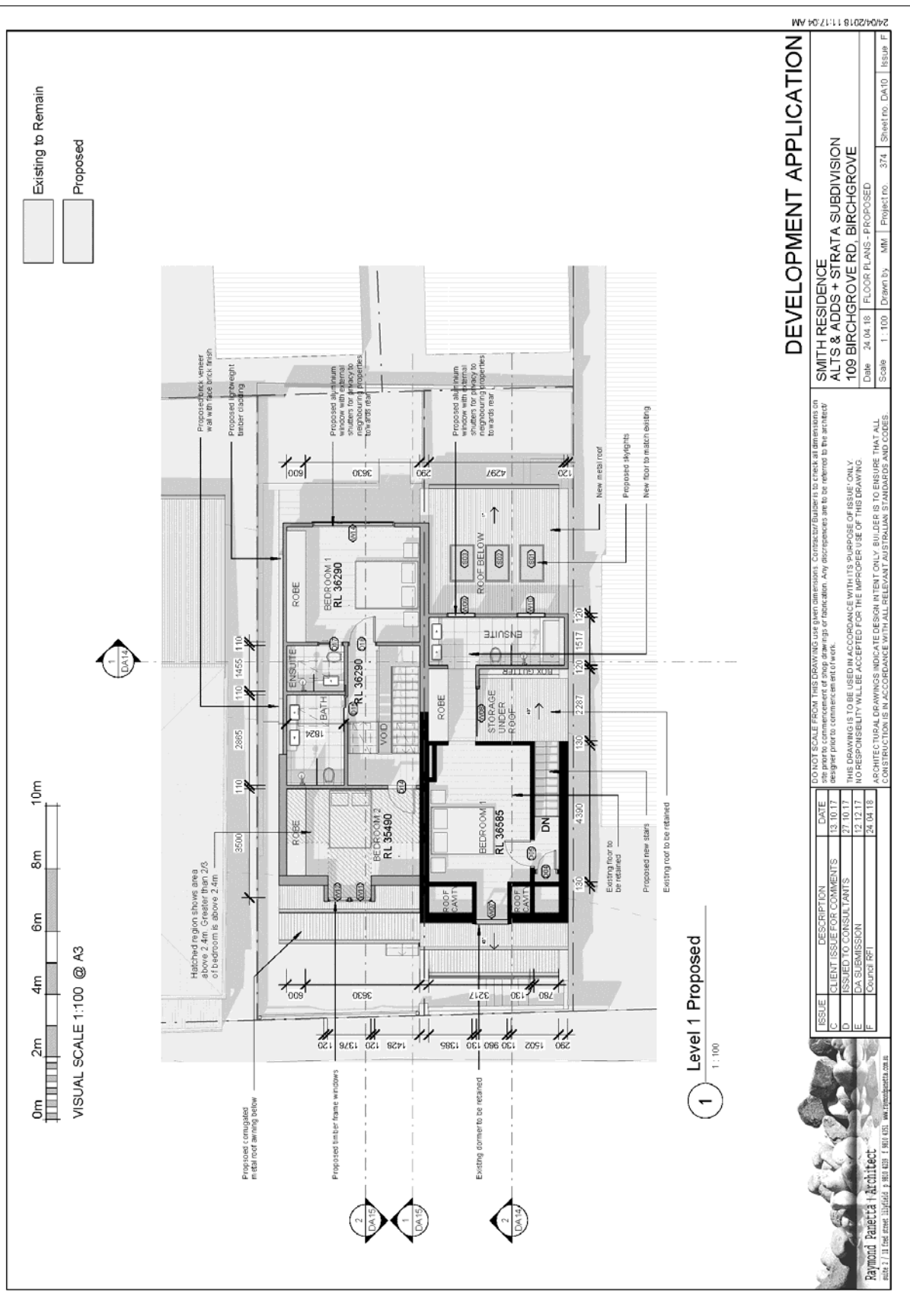
DO NOT SCALE FROM THIS DRAWING use given dimensions. Contractor/Builder is to check all dimensions on site prior to commencement of shop drawings or fabrication. Any discrepancies are to be referred to the architect/designer prior to commencement of work.

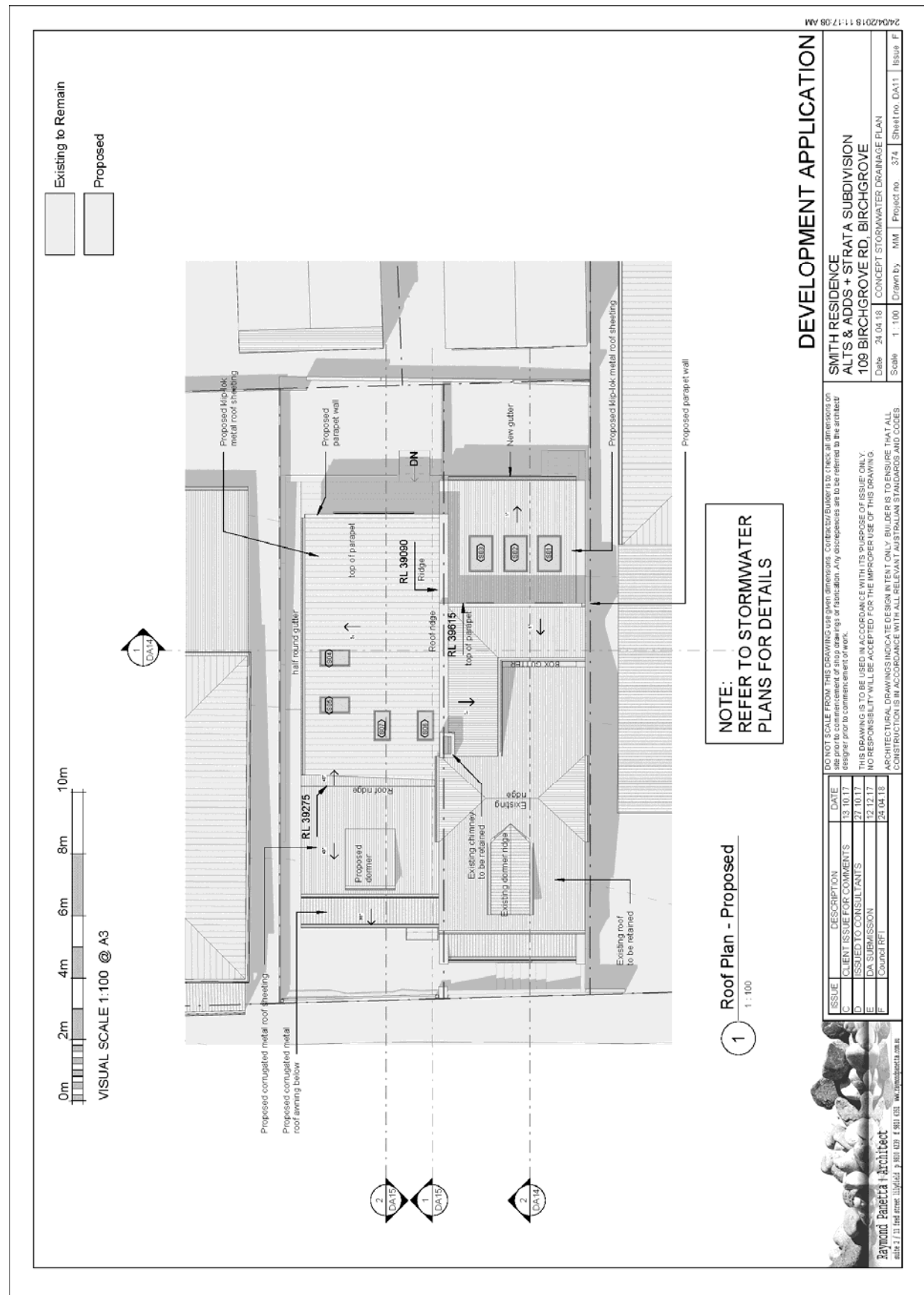
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| E | DA SUBMISSION | 12.12.17 |
| F | Council RFI | 24.04.18 |

Raymond Panetta | Architect

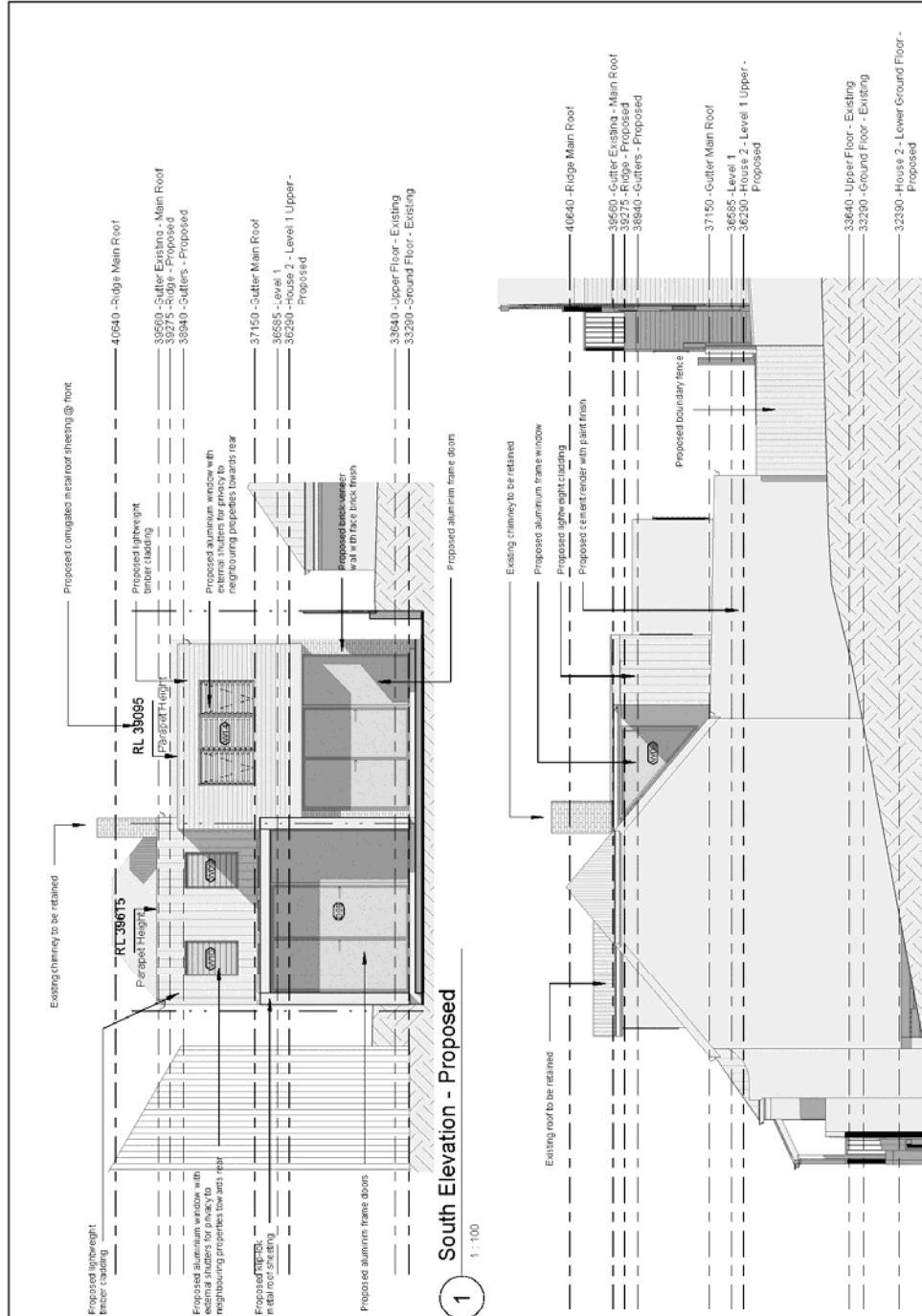
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| Date 24.04.18 | | | | SECTION - EXISTING | | Issue F |
| Scale | 1:100 | Drawn by | MM | Project no. | 374 | Sheet no. DA08 |











West Elevation - Proposed

2

DEVELOPMENT APPLICATION

DO NOT SCALE FROM THIS DRAWING use given dimensions. Contractor/Builder is to check all dimensions on site prior to commencement of shop drawings or fabrication. Any discrepancies are to be referred to the architect/ designer prior to commencement of work.

SMITH RESIDENCE
ALTS & ADDS + STRATA SUBDIVISION
109 BIRCHGROVE RD, BIRCHGROVE

ARCHITECTURAL DRAWINGS INDICATE DESIGN INTENT ONLY. BUILDER IS TO ENSURE THAT ALL CONSTRUCTION IS IN ACCORDANCE WITH ALL RELEVANT AUSTRALIAN STANDARDS AND CODES.

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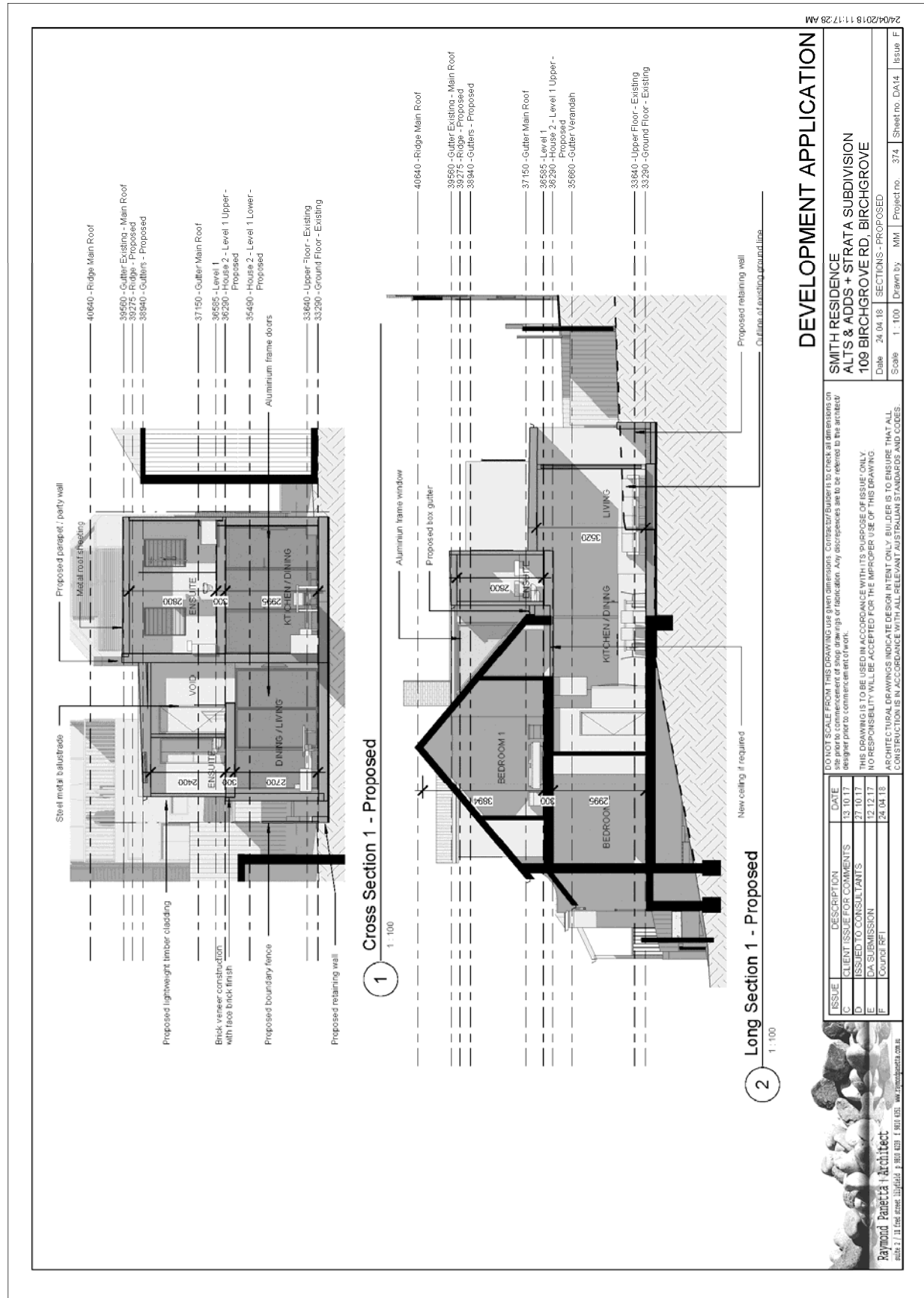
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| D | ISSUED TO CONSULTANTS | 27/10/17 |
| E | DA SUBMISSION | 12/12/17 |
| F | Council RFI | 24/04/18 |

Raymond Panetta + Architect

solite 2 / 11 fred street lillyfield p 9810 4239 f 9810 4351 www.ramondanetta.com.au

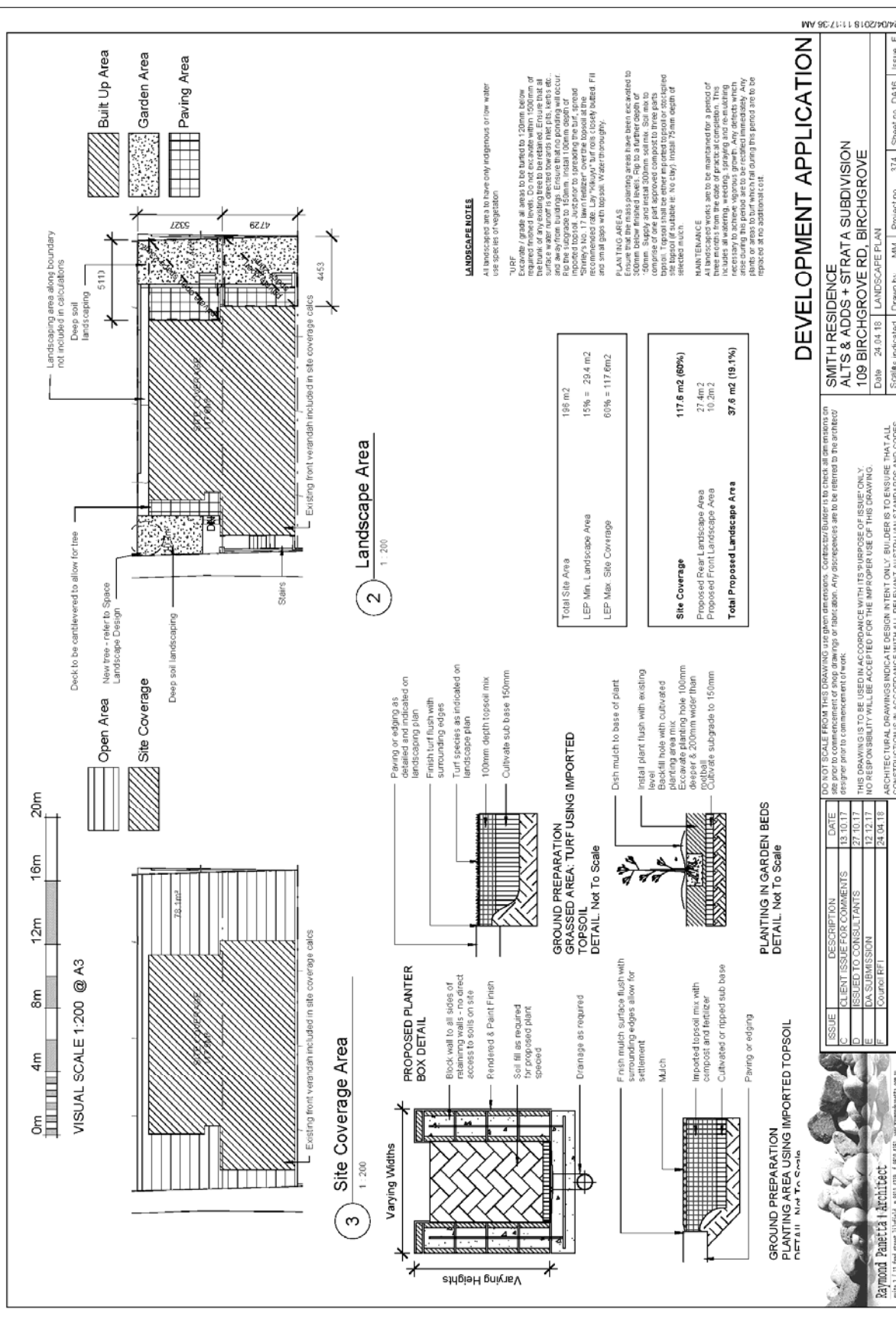




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Raymond Panetta | Architect
suite 2 | 18 first street, alhambra | 900 625 | 9016 ext. www.raymondpanetta.com

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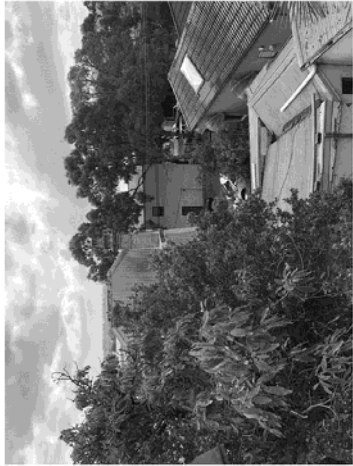




NO. 32 THOMAS STREET
- EXISTING VIEW FROM FIRST FLOOR



NO. 32 THOMAS STREET
- PROPOSED VIEW FROM FIRST FLOOR



NO. 30 THOMAS STREET - EXISTING VIEW FROM FIRST FLOOR



NO. 32 THOMAS STREET
- EXISTING VIEW FROM GROUND FLOOR



NO. 32 THOMAS STREET
- PROPOSED VIEW FROM GROUND FLOOR



NO. 30 THOMAS STREET - EXISTING GROUND FLOOR VIEW



| ISSUE | DESCRIPTION | DATE |
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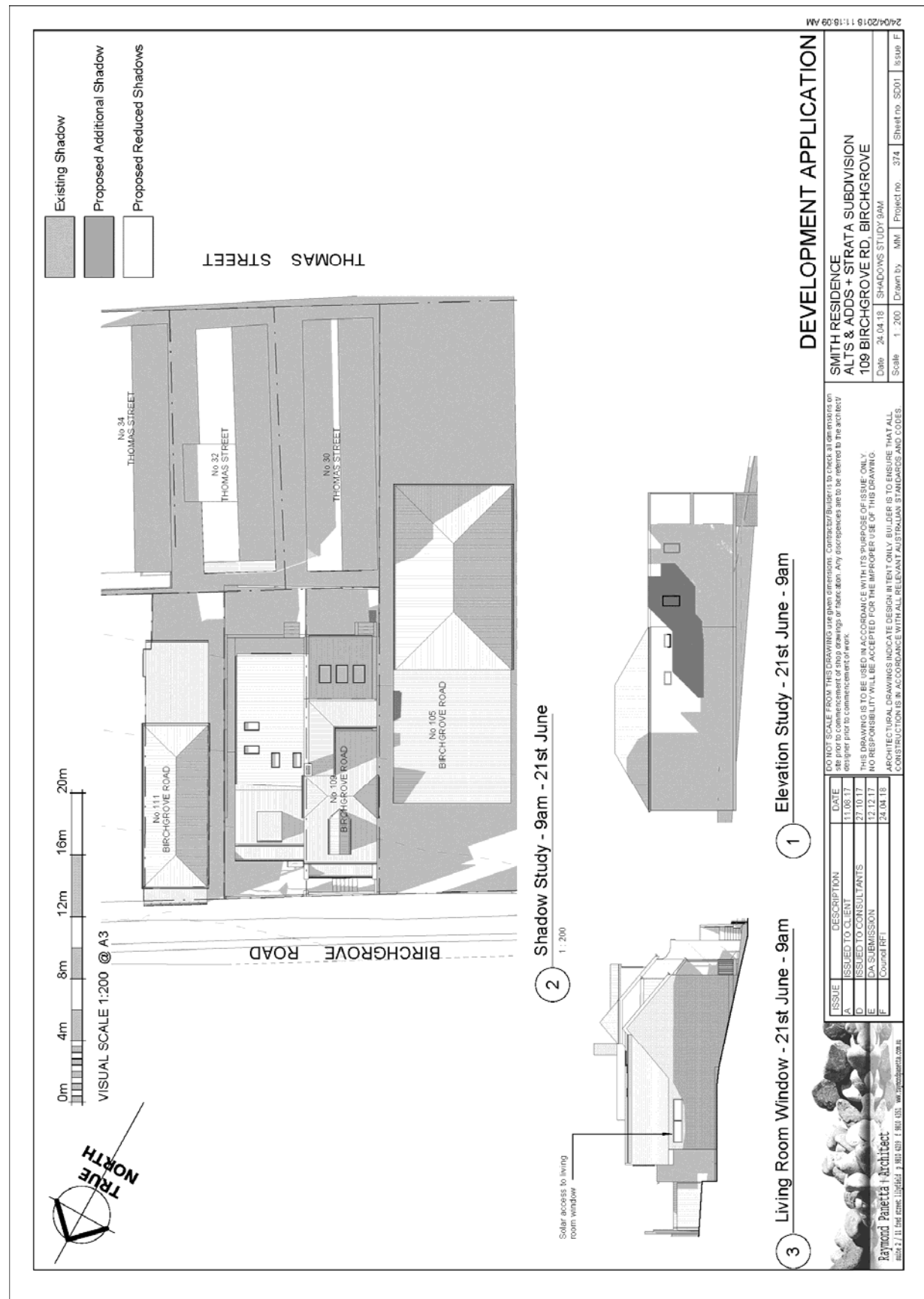
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THIS DRAWING IS TO BE USED IN ACCORDANCE WITH ITS PURPOSE OF ISSUE ONLY.
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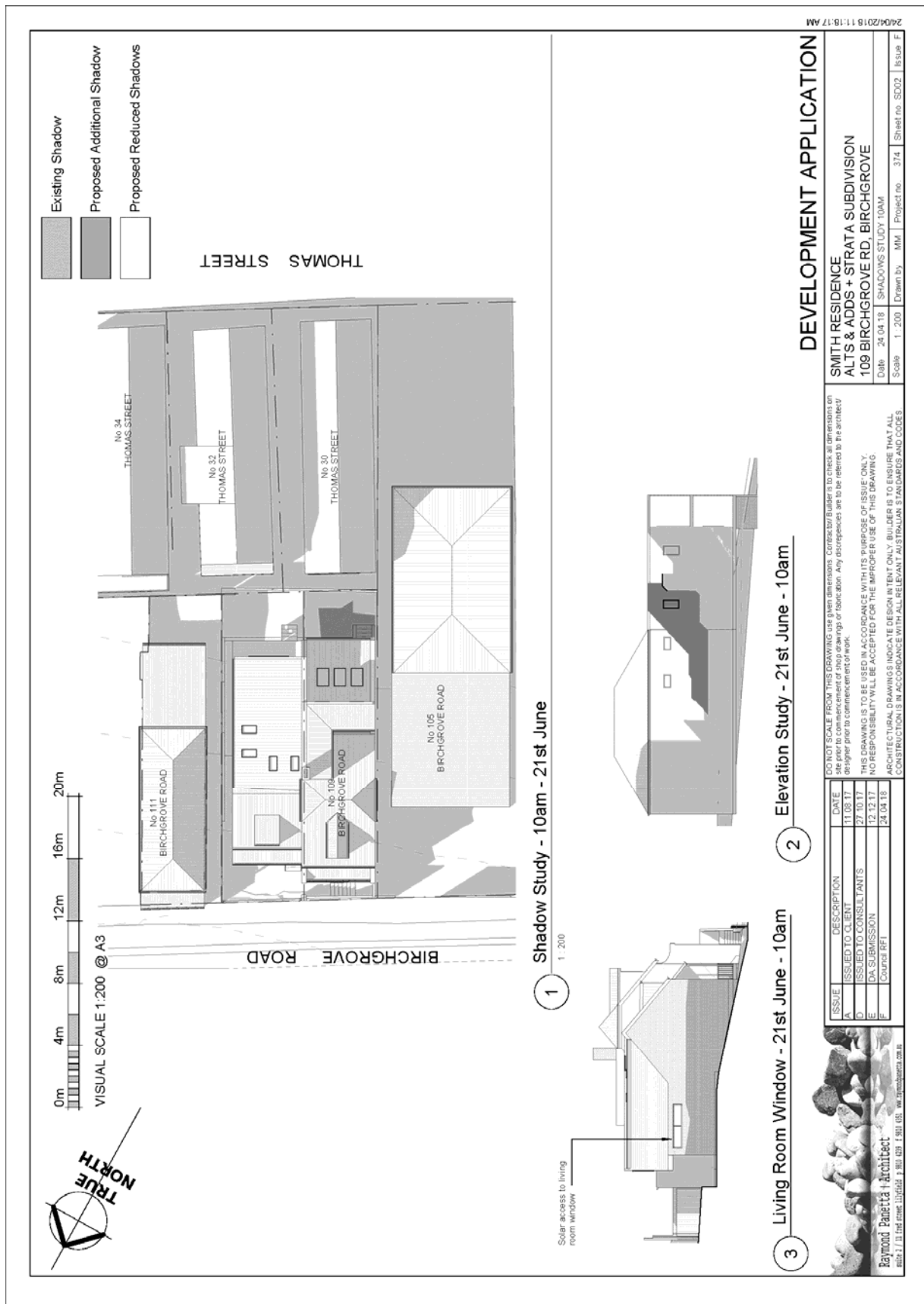
DEVELOPMENT APPLICATION

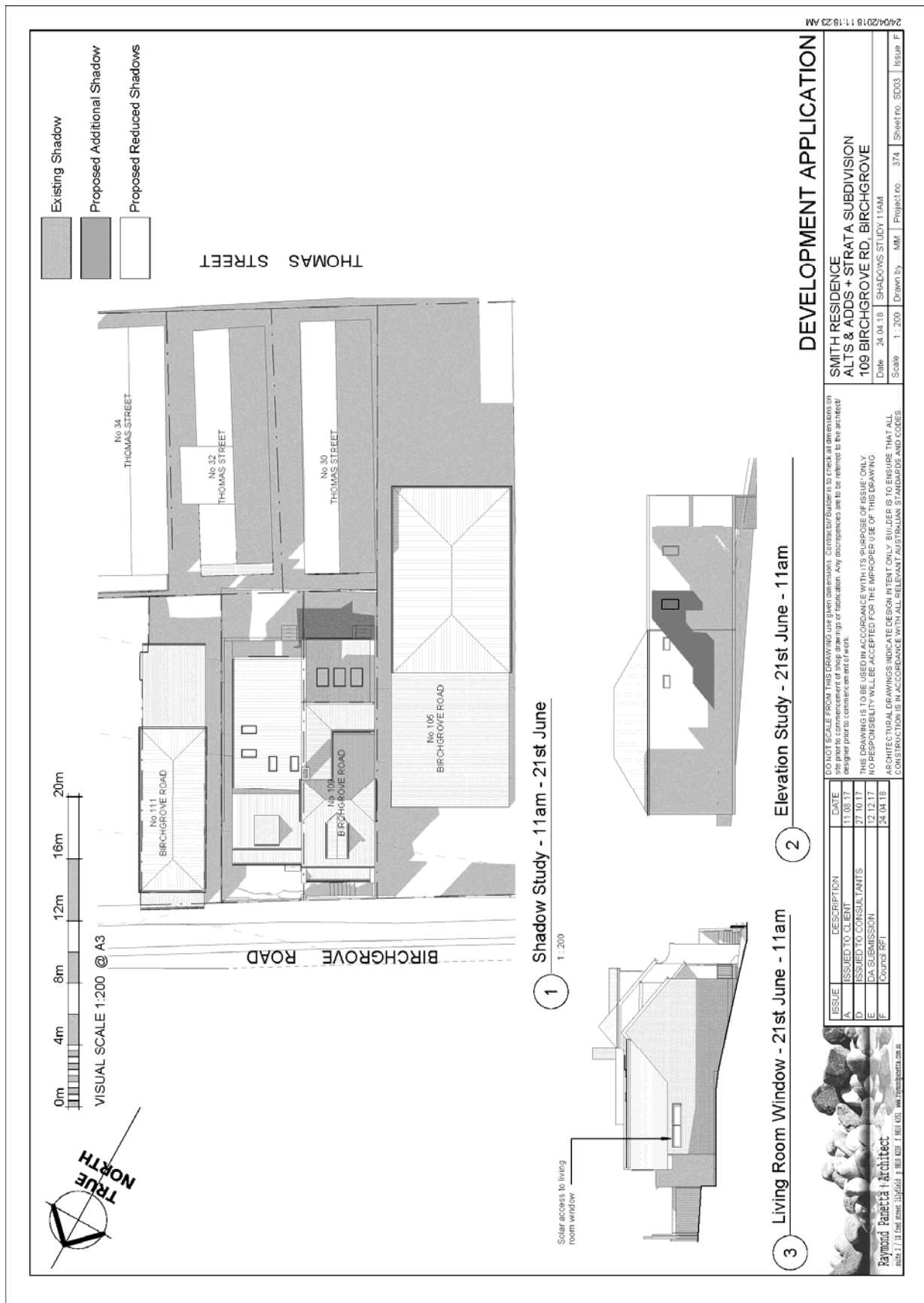
SMITH RESIDENCE
ALTS & ADDS + STRATA SUBDIVISION
109 BIRCHGROVE RD, BIRCHGROVE
Date: 24.04.18
Scale: 1:100
VIEW ANALYSIS

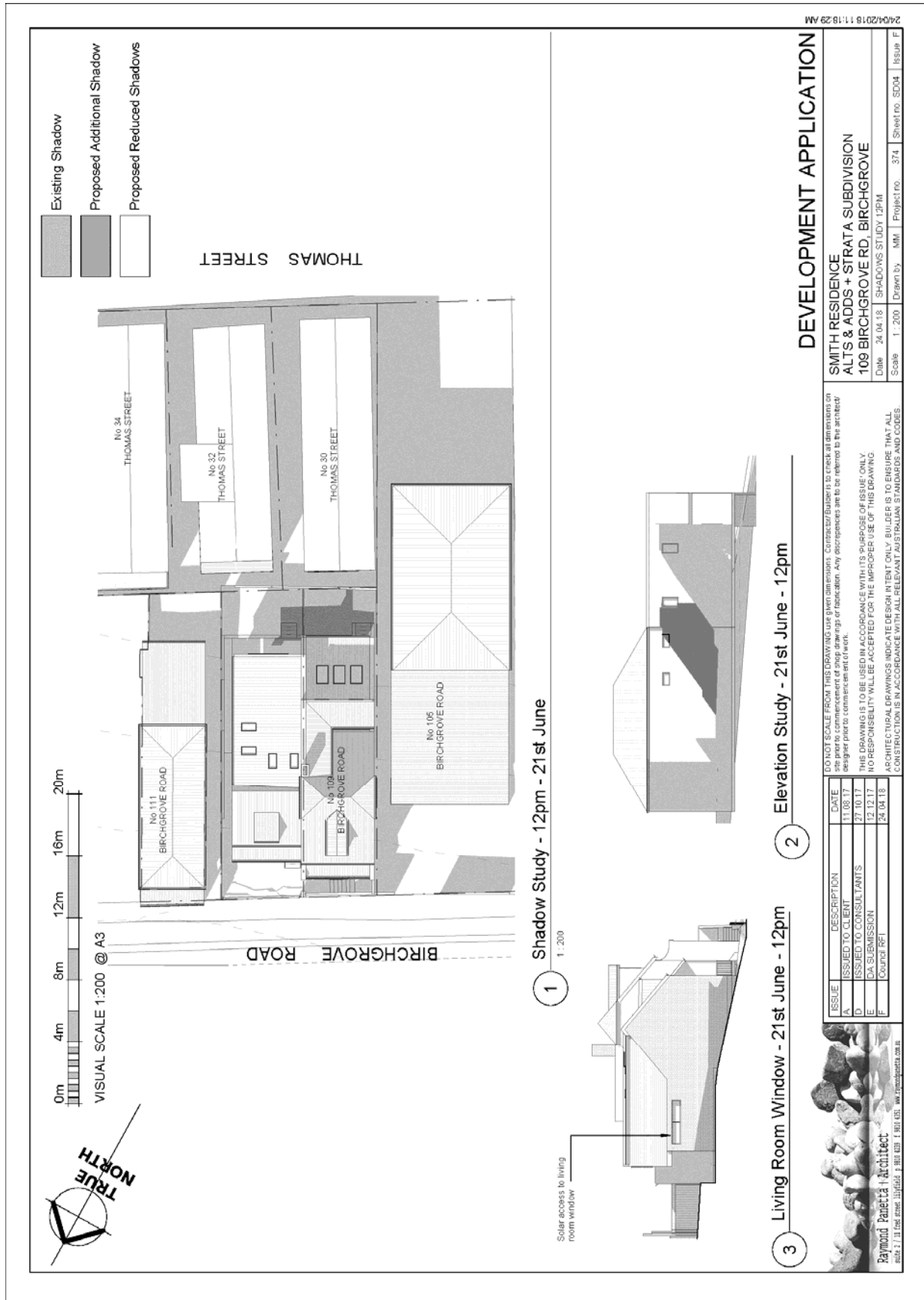
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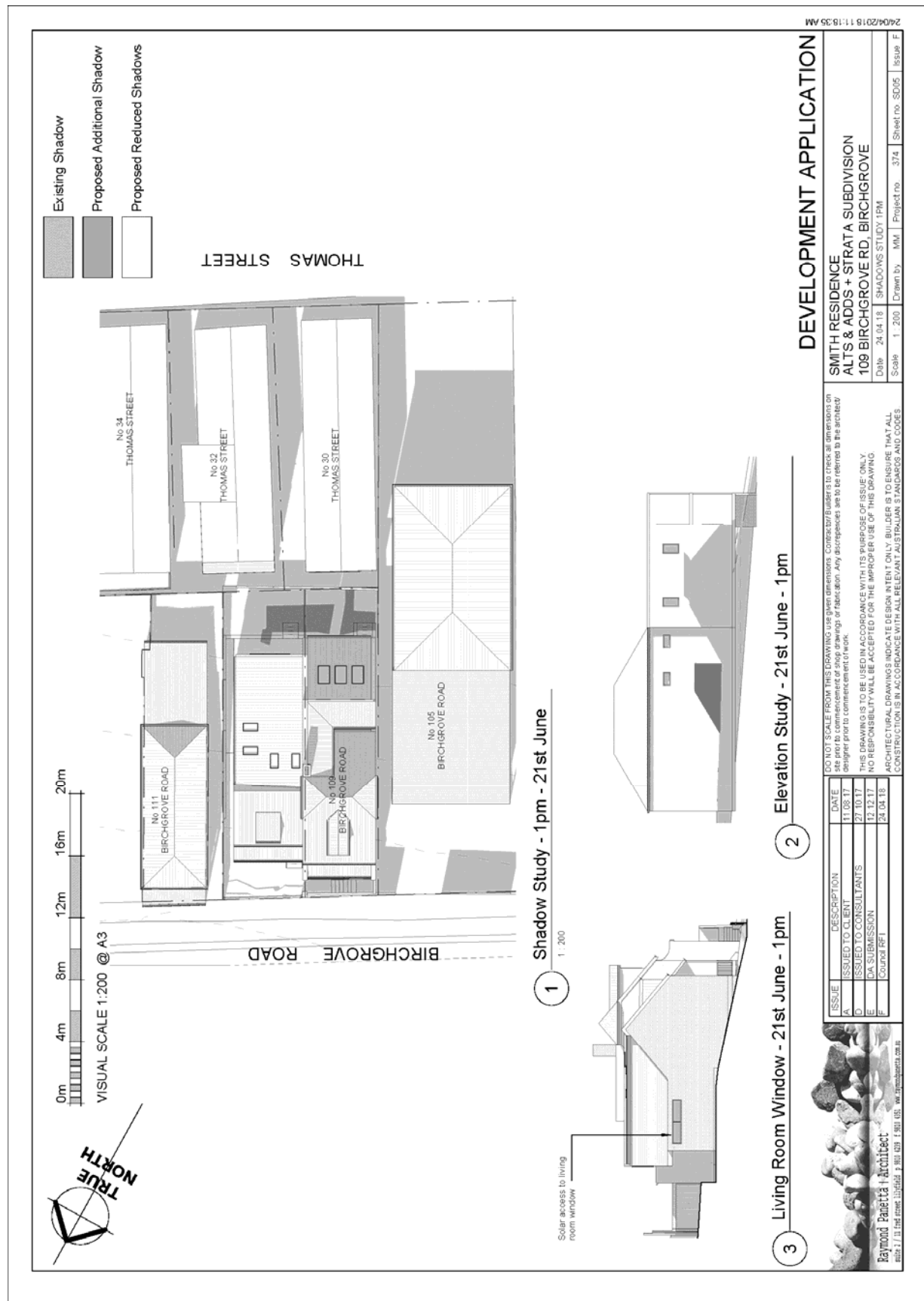
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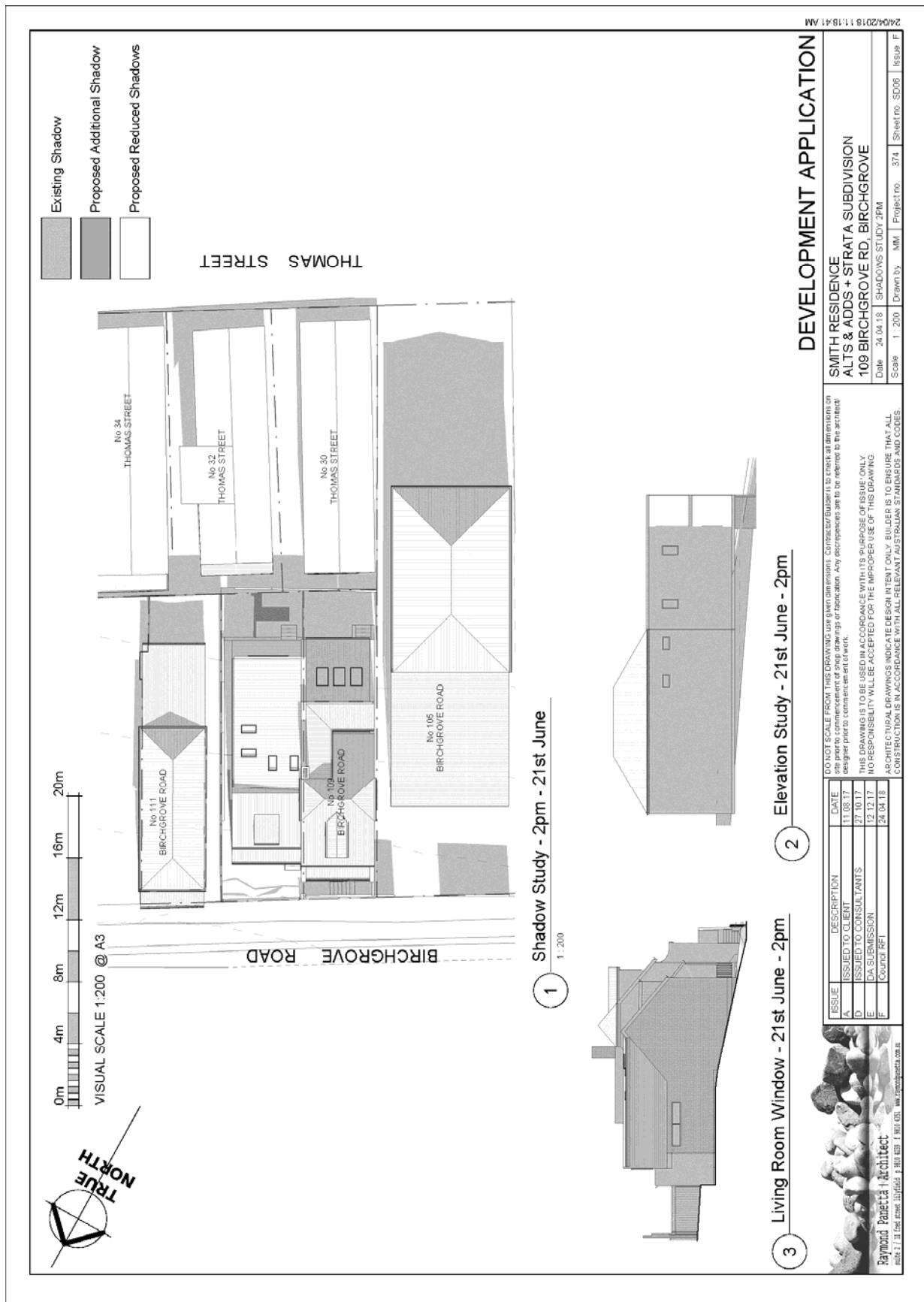


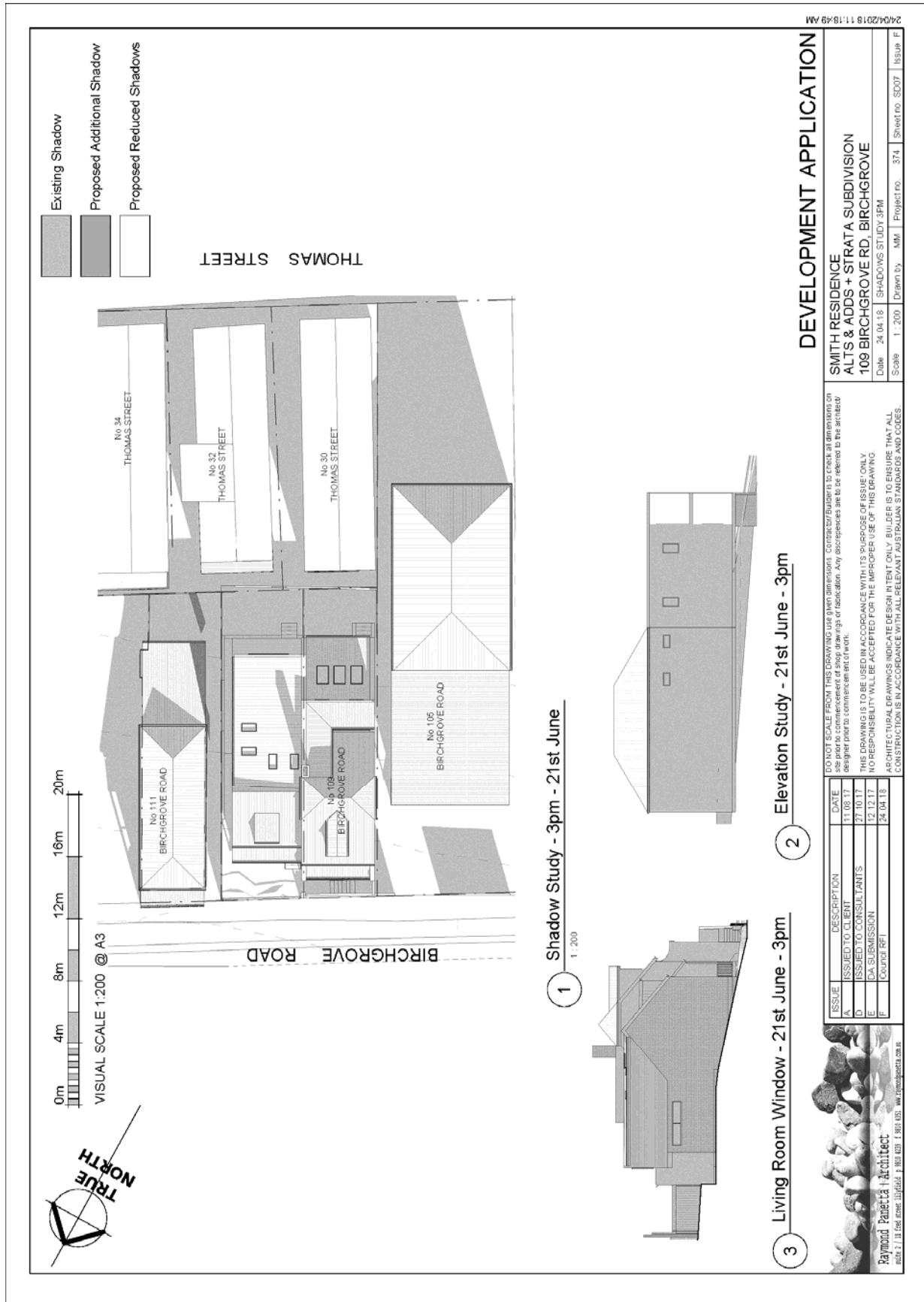


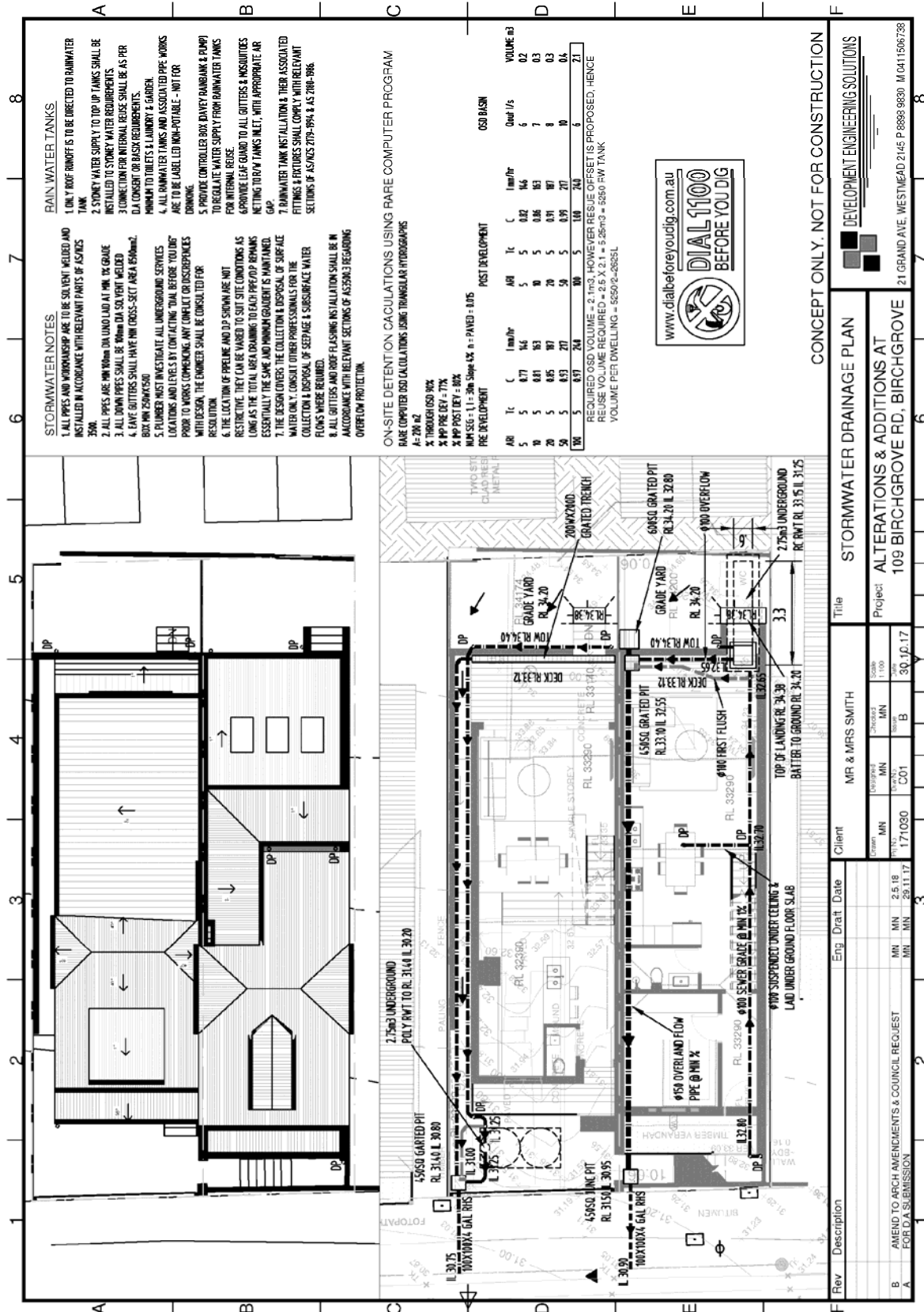












Attachment C – Clause 4.6 – Exceptions to Development Standards

CLAUSE 4.6 VARIATION TO CLAUSE 4.1 – MINIMUM SUBDIVISION LOT SIZE OF THE LEICHHARDT LOCAL ENVIRONMENTAL PLAN 2013 109 BIRCHGROVE ROAD, BIRCHGROVE, NSW, 2041

1. Introduction

This submission seeks a variation to Clause 4.1 of the Leichhardt Local Environmental Plan 2013, which relates to minimum subdivision lot size.

This submission has been prepared with regard to a development application seeking alterations and additions to the existing dwelling and construction of a new dwelling along with a strata subdivision.

As detailed in this written request for a variation to minimum subdivision lot size being a development standard under the Leichhardt Local Environmental Plan 2013, the development meets the requirements prescribed under Clause 4.6 of the Leichhardt Local Environmental Plan (LEP) 2013.

This submission is made under Clause 4.6 of the Leichhardt LEP 2013 – Exceptions to development standards. Clause 4.6 states the following:

“4.6 Exceptions to development standards

- (1) The objectives of this clause are as follows:*
 - (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) Development consent may, subject to this clause, be granted for a development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) the consent authority is satisfied that:*
 - (i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) the concurrence of the Director-General has been obtained.*
- (5) In deciding whether to grant concurrence, the Director-General must consider:*
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

- (b) the public benefit of maintaining the development standard, and
- (c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Plan was made it did not include all of these zones.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4."

The use of Clause 4.6 to enable an exception to this development control is appropriate in this instance and the consent authority may be satisfied that all requirements of Clause 4.6 have been fulfilled in terms of the merits of the proposed development and the content in this Clause 4.6 variation request report.

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard.

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless the:

- (a) the consent authority is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

The Environmental Planning Instrument to which these variations relate to is the Leichhardt LEP 2013.

The development standard to which this variation relates to is Clause 4.1 – Minimum subdivision Lot Size which reads as follows:

- 1) *The objectives of this clause are as follows:*
 - a) *to ensure that lot sizes are able to accommodate development that is consistent with relevant development controls,*
 - b) *to ensure that lot sizes are capable of supporting a range of development types.*
- 2) *This clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan.*
- 3) *The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.*
- 4) *This clause does not apply in relation to the subdivision of individual lots in a strata plan or community title scheme.*

Council's maps identify a minimum subdivision lot size on the site of 200m². Refer to Figure 1.



Figure 1: Minimum Lot Size Map

Source: NSW Legislation, LLEP13 map 006

Under the proposed strata subdivision, proposed Lot 1 will provide for an area of 92m², with Lot 2 providing for an area of 104m² and thus will fall short of the standard.

A written justification is therefore required for the proposed variation to the minimum subdivision lot size development standard, in accordance with Clause 4.6 of the Leichhardt Local Environmental Plan 2013.

2. Extent of Non-Compliance

As noted above Clause 4.1 of the Leichhardt Local Environmental Plan 2013 states that the minimum subdivision lot size for the site is 200m².

The subject site has a total area of 196m². The proposed subdivision is a strata subdivision of the proposed attached dual occupancy into two (2) allotments. Following the proposed strata title subdivision, the proposed lots will provide for an area of 92m² (Lot 1) and 104m² (Lot 2).

Given a minimum lot size of 200m², proposed Lot 1 will fall short of the standard by 108m² and Lot 2 will fall short of the standard by 96m².

3. Is Compliance With the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

The proposed variation from the development standard is assessed against the required tests in Clause 4.6. In addition, in addressing the requirements of Clause 4.6(3), the accepted five possible approaches for determining whether compliances are unnecessary or unreasonable established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council (2007) LEC 827* are considered.

In the matter of Four2Five, the Commissioner stated within the judgement the following, in reference to a variation:

"...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1."

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 has been well founded and that approval of the objection may be consistent with the aims of the policy. The five possible ways are as set out below:

| | |
|---------------|---|
| First | <i>The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.</i> <i>The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable. (applicable)</i> |
| Second | <i>A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary. (not applicable)</i> |
| Third | <i>A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable. (not applicable)</i> |
| Fourth | <i>A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable. (not applicable)</i> |
| Fifth | <i>A fifth way is to establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary. (not applicable)</i> |

In respect of the minimum subdivision lot size standard, the first method is invoked.

The objectives supporting a minimum subdivision lot size control identified in Clause 4.1 are discussed below. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with the standards would be both unreasonable and unnecessary in this instance.

The discussion provided below demonstrates how the proposal is consistent with the objectives of Clause 4.1.

- 1) *The objectives of this clause are as follows:*
 - a) *to ensure that lot sizes are able to accommodate development that is consistent with relevant development controls,*
 - b) *to ensure that lot sizes are capable of supporting a range of development types.*

In response to the Objectives of Clause 4.1, development in the immediate area is generally of a low-density nature largely consisting of single and two-storey attached and detached dwellings. The proposed dual occupancy is considered to be in keeping with this character, being listed as a permissible form of development in the zone. The Statement of Environmental Effects has demonstrated the proposals compliance and consistency with Council's relevant controls, lending the size of the site as appropriate to accommodating the proposed development.

The proposed lot sizes have demonstrated that they are capable of supporting the proposed development along with other types, as the proposed lot sizes remain consistent with the subdivision pattern exhibited along Birchgrove Road.

Considering the above, the proposed development aligns with the objectives of Clause 4.1.

The development is generally consistent with the current planning controls as outlined in the submitted Statement of Environmental Effects.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard.

4. Are there Sufficient Environmental Planning Grounds?

The assessment above demonstrates that the resultant environmental impacts of the proposal will be satisfactory.

The proposed non-compliance in minimum subdivision size of lots into strata title will not result in negative impacts to the development site itself or the adjoining properties, as discussed in the Statement of Environmental Effects and shown on the submitted architectural plans.

It should be noted that, although the proposed allotment sizes fall below the development standard, each proposed lot is capable of accommodating a dwelling, the site provides for appropriate areas of landscaping and private open space which generally align with Council's LEP and DCP. Overall, the variation does not have a detrimental impact on the capacity of the lots to comply with Council's controls.

It is only through a recent court case, *DM & Longbow Pty Ltd v Willoughby City Council [2017] NSWLEC 1358*, that has necessitated the requirement of a Clause 4.6 Variation for minimum lot size where strata or community title subdivision is proposed. This has only arisen as an anomaly due to the way the Clause is written, as prior to this decision of the court Clause 4.1(4) was interpreted to mean that no minimum lot size was prescribed to strata or community title subdivision, only Torrens title.

In dialogue with the Department of Planning and Environment since the court ruling, it was noted that an amendment to Clause 4.1(4) which would clarify the wording was discussed and exhibited in 2015 but had been put on hold pending further discussion.

The wording used in the clause currently states:

"4) This clause does not apply in relation to the subdivision of individual lots in a strata plan or community title scheme."

The proposed text in the amendment states:

"4) This clause does not apply in relation to the following:

- a) the subdivision of land under the Community Land Development Act 1989,*
- b) the subdivision of land into lots as a strata plan under the Strata Schemes (Freehold Development) Act 1973,*
- c) the subdivision of lots in a strata plan under that Act."*

Although having been on hold, the Department of Planning and Environment has indicated that renewed discussions were underway following the decision of the court on this matter. It is worth recognising that with the above amended wording, minimum subdivision lot size for strata and community title subdivision would not apply, making the proposal compliant.

In this case, strict compliance with the development standard for minimum subdivision lot size in the Leichhardt Local Environmental Plan 2013 is unnecessary and unreasonable.

5. Is the Variation in the Public Interest?

Clause 4.6 states that the development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is to be carried out.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard under Part 4.

The development as proposed will be in the public interest as it is consistent with the objectives of Clause 4.1.

The building contextually has regard to its surrounding properties and is considered to provide sufficient open space and landscaping for the amenity of future residents.

Furthermore, it is important to also consider the objectives of the R1 General Residential zone in relation to the development, which are as follows:

Zone R1 General Residential

Objectives of zone

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To improve opportunities to work from home.*
- *To provide housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.*
- *To provide landscaped areas for the use and enjoyment of existing and future residents.*

- *To ensure that subdivision creates lots of regular shapes that are complementary to, and compatible with, the character, style, orientation and pattern of the surrounding area.*
- *To protect and enhance the amenity of existing and future residents and the neighbourhood.*

In response to the above the following is provided:

The proposal optimises the development potential of the site and provides for a new infill dwelling hence, contributing to the housing stock within the locality facilitating the housing needs of the community. The proposal contributes to the mix of single and two-storey attached and detached dwellings in the area. The proposal continues the residential use on the site remaining consistent with adjoining development and the existing dwelling on site.

As detailed within this Statement of Environmental Effects the development is found to be conducive to Council's development controls and has been designed in a manner which responds to the localities distinct character, dwellings style and orientation expressed along Birchgrove Road. The resulting lot sizes are of a sufficient size to provide adequate landscaping and private open space for the benefit of future residents. The lots which result are of a regular size and remain consistent with lot sizes exhibited along the street. The Statement of Environmental Effects has concluded that there is no adverse impact to the amenity of future and existing residents, rather this will be enhanced through the proposal.

The proposed development therefore meets the objectives of the zone.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standards, noting the development will be in the public interest.

6. Public Benefit of Maintaining the Standard

It is considered that the public benefit will not be undermined by varying the standard. The variation to the minimum subdivision lot size is consistent with the approach to development and subdivision of developed land in the immediate area. No negative impacts to the development itself or its adjacent properties will occur due to the variation.

The proposal provides for the orderly and economic development of the site. Given the site's orientation, location and context it is considered that the site is well suited for the development.

The development is well articulated and designed.

The development is generally consistent with the current planning controls.

It is not considered that the variation sought raises any matter of significance for State or Regional environmental planning.

Under the above, it is considered that the public is not impacted in any way by maintaining the standard.

7. Is the Variation Well Founded?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the Leichhardt LEP 2013 in that:

- ☐ Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development;

- ❑ There are sufficient environmental planning grounds to justify the departure from the standards;
- ❑ The development meets the objectives of the standard to be varied (minimum subdivision lot size) and objectives of the R1 General Residential zoning of the land;
- ❑ The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- ❑ The breach does not raise any matter of State or Regional Significance; and
- ❑ The development submitted aligns with the predominantly residential nature of the neighbourhood.

Based on the above, the variation is considered to be well founded.

8. General

Clause 4.6 also states that:

"(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. When this plan was made it did not include all these zones.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4,"*

This variation does not relate to the subdivision of land in the stated land use zones. The variation sought is not contrary to subclause (6).

Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission.

A BASIX certificate has been prepared in relation to the proposed development and is submitted under a separate cover.

Clauses 5.4 is not applicable in this instance.

9. Conclusion

The proposal does not strictly comply with the minimum subdivision lot size control as prescribed by Clause 4.1 of the Leichhardt Local Environmental Plan 2013. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the Leichhardt Local Environmental Plan 2013 are satisfied as the breach to the controls does not create any adverse environmental impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and that the use of Clause 4.6 of the Leichhardt Local Environmental Plan 2013 to vary this development control is appropriate.

Based on the above, it is sensible to conclude that strict compliance with the minimum subdivision lot size is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.

Should you have any questions, please do not hesitate to contact me.

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